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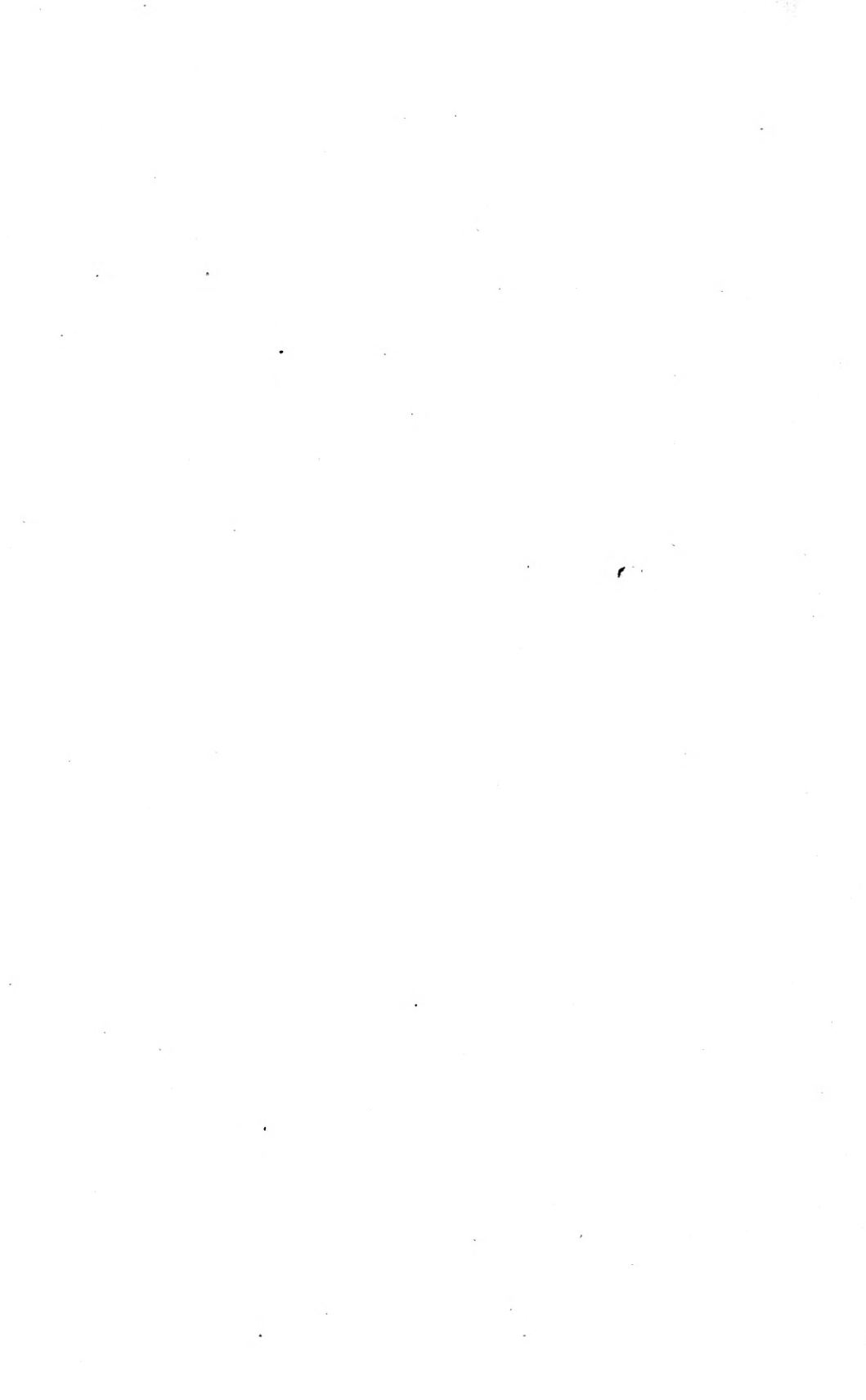


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NO. 1.

GLANVILL REVISED.

WHEN I was editing for the Selden Society some precedents for proceedings in manorial courts I had occasion to remark that one of the manuscripts that I had been using — it lies in the library of our English Cambridge, and is there known as Mm. I. 27 — contained “a revised, expanded, and modernized edition” of Glanvill’s treatise on the laws of England.¹ This remark brought to me from the American Cambridge a very kind note suggesting that more should be said of this revised Glanvill, and the editors of the HARVARD LAW REVIEW have been good enough to permit me to say a few words about it in these pages. I hope that the circulation of their excellent magazine will not suffer thereby.

Almost the whole of the manuscript book in question seems to me to have been written by one man, though at many different times. It opens with a table of contents. Upon this follows a *Registrum Brevium* which I should ascribe to Edward I.’s reign (1272–1307), and not to the latest years of that reign. Then at the beginning of a new quire begins the revised Glanvill. This, as I shall remark below, gradually degenerates into a mere series of writs. Then we reach “Explicit summa que vocatur Glaunvile.” A few more writs follow, with some notes and the articles of the eyre. Then the correspondence which took place between Henry III. and de Montfort on the eve of the battle of Lewes; then a short account of that battle (14 May, 1264). Then the

¹ The Court Baron, Selden Soc., p. 6.

king's writ to the mayor and bailiffs of York announcing that peace had been made. Then the following: "And in order that you may know of the events of the battle fought at Evesham between Worcester and Oxford on Tuesday the nones of August in the 49th year of King Henry, son of King John, between the lord Edward son of the King of England and the lord Gilbert of Clare Earl of Gloucester, and Simon of Montfort and his followers, who was slain on the same day, as was his son Henry and Hugh Despenser. [Here we come to the end of a line and a full stop. Then we have the following at the beginning of the next line:] In the 49th year of King Henry, son of King John, and the year of Our Lord 1265, at Whitsuntide, the following page (*subsequens pagina*) was written in the chapel of S. Edward at Westminster and extracted from the chronicles by the hand of Robert Carpenter of Hareslade, and he wrote this." The date is then given by reference to various events, ranging from the creation of the world downwards. It is the year of grace 1265; it is the 33d year since King Henry's first voyage to Gascony; since his second voyage it is twelve years plus the interval between the 1st of August and Whitsuntide; it is twenty years from the beginning of the king's new work at Westminster, and one year since the battle of Lewes. Thus we are brought to the foot of a page. At the top of the next page (and the structure of the book seems to show that nothing has here been lost) we find a precedent for a will, which is followed by a few legal notes written in French, and these bring us to the well-marked end of one section of the book.

The statement about Robert Carpenter, minutely accurate though it is meant to be, is none the less a very puzzling one. In the first place, "he wrote this," (*hic hoc scripsit*) is not free from ambiguity. Did he trace the very characters that we now see, or was he merely the author, the composer or compiler of the text that we now read? And then, whatever "wrote" may mean, what was it that he wrote? At Whitsuntide in the year 1265, at Whitsuntide in the 49th year of Henry III., he cannot have written anything about the battle of Evesham, for that battle was still in the future. We are told that he wrote "the following page," but the following page contains a precedent for a will, and contains nothing that could have been "extracted" from any "chronicles." I have not solved the difficulty.

Was the man who wrote this manuscript the man who revised

and tampered with Glanvill's text? This also is a question that I cannot answer. On the one hand, what he gives us is not always free from mistakes of that stupid kind which we should naturally attribute rather to a paid copyist than to a man who was putting thought into his work. On the other hand, both in the Glanvill and in the other matters contained in this volume there are frequent allusions to one particular part of England, namely, the Isle of Wight and the neighborhood of Southampton and Portsmouth. Thus in Glanvill's famous passage about the privileged towns, which describes how by becoming a citizen of one of them a villain will become free, — a passage to which Dr. Gross has lately invited our careful attention,¹ — the name of Southampton has been introduced; and when the writer wants an example of a writ addressed to a feudal court, he supposes the court to be that held by the guardian of the heir of Baldwin de Redvers, Earl of Devon and lord of the Isle of Wight. Allusions to Baldwin and his family (the family de L'Isle, de Insula, that is, of the Isle of Wight) are not uncommon. But this question, whether Carpenter was the man who revised Glanvill's text, or whether he merely copied a text which had already been revised by some one else, is a question which we cannot answer until all the MSS. which profess to give Glanvill's treatise have been examined. In the mean time I will indulge in no speculations, but will simply describe what is found in the Cambridge manuscript.

A few words about the date of this revised version may however be premised. As it stands it cannot have been written before 1215, for it alludes to Magna Charta; before 1236, for it alludes to the Statute of Merton; before 1237, for it alludes to the Statute or ordinance of that year which fixed a period of limitation for divers writs.² Further, it alludes to the minority of Baldwin de L'Isle. This allusion may be ambiguous, for unless I have erred, there were two periods in Henry III.'s reign during which a Baldwin heir to the Earldom of Devon was an infant in ward to the king. The first of these occurred at the beginning of the reign.³ The second opened in 1245, and must have endured until 1256 or thereabouts.⁴ But our "Glanvill" also alludes to Isabella,

¹ Gross, *Gild Merchant*, i. 102.

² *Harvard Law Review*, iii. 102.

³ *Annales Monastici*, i. 113; Courthope, *Historic Peerage*, 158.

⁴ *Annales Monastici*, i. 99, ii. 99; Excerpts from the *Fine Rolls*, i. 431.

Countess of Devon; and this seems to bring down its date to 1262, for in that year the last of these Baldwins died, and the inheritance passed to Isabella, who had married William de Forz, Count of Aumâle.¹ Then at the very end of the work we find a writ in which King Henry calls himself Duke of Aquitaine, but does not call himself Duke of Normandy or Count of Anjou. This writ must have been issued between Henry's resignation of the Norman duchy in 1259 and his death in 1272. Also it is a writ founded either upon one of the Provisions of Westminster (1259) or upon a clause in the Statute of Marlborough (1267) which re-enacted that provision; I think that it is founded upon the former. On the other hand, unless this be a trace of the Statute of Marlborough, I see no other trace of that comprehensive Statute. I see no mention of Edward I., and no allusion to any of the many Statutes of his reign. Almost immediately after the end of the *Glanvill* there come—and there is no transition from one quire to another—articles for an eyre of the 40th year of Henry III. (1265-6), and then we have the passage which tells of Lewes and Evesham, and of what Robert Carpenter did in 1265. On the whole, I am inclined to suppose that the *Glanvill* was written within a short space on one side or the other of 1265, though it contains more writs of trespass than I should have expected to find at that date.² The man who wrote it—I mean the scribe from whose pen we get this manuscript of *Glanvill*—must have lived on into Edward I.'s reign. As already said, he copied a Register of that reign, and he copied various Statutes. I think that he copied the *Circumspecte Agatis*, which is ascribed to 1285. The Second Statute of Westminster (1285) is in the book, but was written by another hand.

If the revised *Glanvill* belongs, and I think that in its present shape it does belong, to the last years of Henry III., then it is somewhat younger than Bracton's work, and we may be not a little surprised that at so late a time some one attempted to refurbish the old text-book and bring it "up to date;" for in the interval there had been great changes in the law, and many new actions had been invented. We cannot say that success crowned the endeavor. The reviser seems to have started upon his task with the intention of explaining difficulties, correcting statements

¹ *Annales Monastici*, i. 499; *Calendarium Genealogicum*, i. 106.

² *Harvard Law Review*, iii. 177.

which had become antiquated, and inserting new writs and new rules at appropriate places. But ultimately he discovered that the work was beyond his powers, or perhaps he grew weary of it. He divides his text into "treatises" (*tractatus*). The following scheme will show how his "treatises" correspond to the "books" and "chapters," which we see in the printed volumes:—

1. *Tractatus de baroniis et placito terre* = lib. i., ii., iii.
2. *Tractatus de aduocationibus ecclesiarum* = lib. iv.
3. *Tractatus de questione status* = lib. v.
4. *Tractatus de dotibus mulierum, unde ipse mulieres nichil perceperunt et cum partem aliquam perceperunt* = lib. vi., vii.
5. *Tractatus de querela et fine facto in curia domini Regis et non observato* = lib. viii.
6. *Tractatus de homagiis faciendis et releuiis recipiendis* = lib. ix. cap. 1-10.
7. *Tractatus de purpresturis* = lib. ix. cap. 11-14.
8. *Tractatus de debitis laycorum que solummodo super proprietate rei prodita erunt* = lib. x. cap. 1-13.
9. *Tractatus de placitis que super possessionibus loquuntur* = lib. x. cap. 14-18.

At the end of what is the tenth book of our printed Glanvill, he begins a new, a tenth "treatise," "*De placitis que per recognitiones terminantur*," and he follows Glanvill down to a point which is in the middle of the third chapter of the eleventh book of our *textus receptus*. He has still to deal with part of the eleventh book, and then with the three remaining books. For a moment we think that he is going to follow Glanvill in his treatment of the possessory assizes. These possessory assizes are the subject-matter of Glanvill's thirteenth book. But from this point onwards the work degenerates into a mere Register of Writs, though among the writs a few explanatory notes will now and again be found. The compiler deals first with the possessory assizes, but then gives us writs of all sorts and kinds, many of which have been already dealt with in the previous "treatises." I hear him saying to himself, "After all, it is a hopeless job, this attempt to edit the old text-book. Glanvill, or whoever its author may have been, was a great man in his day, but his day is over, and we cannot bring it back. Let us at all events have a really useful list of those writs which are current in our own time." This, however, does not prevent him from writing at the end of his register, "Here endeth the Summa which is called Glanvill."

I shall best be able to convey an idea of his work by giving the most remarkable passages which he adds to our *textus receptus* of Glanvill, and some of those passages in which he qualifies or corrects that text. But he is always qualifying or correcting it about little matters. For example, he glosses some very simple words; thus, "proceres, id est, barones," "equidem, id est, certe," "natiuitate, id est, nauitate." This last gloss shows that he is more familiar with French than with Latin. We see the growth of a technical language when Glanvill's *essoine* "de infirmitate reseantise," becomes "de malo lecti," and even "mall de lith," which is to be contrasted with "mall de venue." And so he corrects his author by writing "defendens, id est, tenens." Then by a marginal note he sometimes stigmatizes a passage as "*Lex Antiqua*," or "*Jus Antiquum*," and is fond of speaking of what is done "*moderno tempore*." Sometimes he marks the interpolations by the word "*Addicio*," or the word "*Extra*;" but he is not very careful in this matter. He (I am speaking as though the scribe of our MS. was also the man who made the changes in Glanvill's text) was not much of a Latinist, and I doubt whether he was a great lawyer. At any rate, he succeeds in obscuring some matters which are clear enough in our printed book.

I hope that the passages printed below will speak for themselves to any reader who has the *textus receptus* at hand. A collection of variants cannot be lively reading, but it still may be a useful thing. I have only noticed the considerable changes, for, as already said, the reviser is constantly making minor alterations, some of which are called for by the evolution of the various courts, while others seem almost gratuitous substitutions of a modern word for one which is going out of fashion. For three passages I will ask attention. The reviser says twice over that the recognitors of the grand assize are not to use in their oath a certain word which is used by other jurors. That word he seems to write as *amuncient*. This I take to be a *mun cient* or a *mun scient*, and to mean *to the best of my knowledge*. Before now in these pages I have drawn attention to a similar remark in a *Registrum Brevium*, — the phrase there I took to be a *son scient*.¹ In the grand assize you must swear positively that A or that B has the greater right. You must not talk about the best of your knowledge or anything of the kind.

¹ Harvard Law Review, iii. 111.

In a curious passage about divorce, our writer speaks of divorce for blasphemy, and refers to the opinion of one whom he calls *aug' mag'*. The reference is, I believe, to a passage from Augustine (Augustinus Magnus) which is contained in the Decretum Gratiani. The canonists held "quod contumelia Creatoris soluit ius matrimonii."¹ Lastly, we have a remarkable statement to the effect that of old the goods of bastards who died intestate belonged to their lords, but that nowadays they belong to our lord the king by the grant of our lord the pope. But without further preface I must produce my collection of variants.

F. W. MAITLAND.

CAMBRIDGE, ENGLAND,
Nov., 1891.

INCIPIT TRACTATUS DE CONSTITUCIONIBUS LEGUM AC
IURIUM REGNI ANGLIE TEMPORE SECUNDI HENRICI
REGIS.

i. 5. Cum quis conqueritur domino Regi vel eius iustic[iariis] vel cancellariis² super iniusta detencione de aliquo libero tenemento si fuerit loquela talis

i. 7. quindecim dierum ad minus, ut liber homo habebit respectum quindecim dierum et baro tres ebdomadas et comes unum mensem.³

i. 8. At the end comes the following passage which is noted in the margin as an "Addicio"—Item moderno tempore⁴ si quis summonitus fuerit ad respondendum de terra et implacitatus fuerit per breve de recto vel de ingressu vel per breve quod dicitur "precipe," et placitum illud fuerit coram iusticiariis, et primo die summonitus non venerit, capietur terra in manu domini Regis, et ad comitatum si placitum fuerit et primo die non venerit, ponetur per vadium et plegios ad respondendum de defalta et capitali placito ad secundum comitatum si placitetur de recto, et si ad secundum comitatum non venerit ipse qui implacitatur, capietur terra in manu domini Regis, et si per quindecim dies non replegiata ipsa terra in manu domini Regis fuerit, perdet tenens seisi-

¹ c. 7, X. 4. 19; see the passage from Augustine in C. 28, qu. 1.

² Here and elsewhere a notice of the Chancery as the place where writs are obtained is interpolated.

³ I do not remember to have seen this rule elsewhere.

⁴ The procedure seems to have been made a little less dilatory than it was.

nam. Et replegiari debet tenementum illud de illo per quem in manu domini Regis capta fuerit ut de iusticiariis vel comitatu per breue domini Regis illis directo. Et sciendum quod postquam tenementum aliquod captum fuerit in manu domini Regis non potest tenens se essoniare nec defaultam facere nisi perdat tenementum illud per defaultam.

i. 12. vel plegios inueniet, scilicet, secundum antiquum statutum aut fidem dabit.¹

i. 13. iusticiariis nostris de banco². . .

i. 18. This is preceded by a classification of essoins in a tabular form and the following remark — Nulla mulier debet in aliquo placito essoniari de seruicio domini Regis, quia non possunt nec debent nec solent esse in seruicio domini Regis in exercitu nec in aliis seruiciis regalibus.

i. 30. Omit — Huiusmodi enim publicus actus primus dies similiter adiudicabitur utilis.

i. 31. et in nouis disseisinis, de ultima presentacione et in aliis consimilibus³. . . .

corpus enim capietur vel attachietur de consilio iusticiariorum ut festinancius puniatur ille absens rettatus de pace domini Regis infrincta propter curie contemptum.

i. 32. In the margin over against the last sentences describing the imprisonment of a defaulting appellor stands — Jus antiquum.

ii. 3. The count is more elaborate: the demandant traces his pedigree step by step. The word "defendens" is glossed by "tenens." The fine for recreancy is 40, not 60 shillings — this, I think, is a mistake. The punishment imminet super campionem victum vel super dominum suum si eum sursum caperet. This I understand to mean that the punishment for recreancy falls on the champion himself unless his hirer raises him from the field. By coming to the aid of the craven whom one has hired one exposes oneself to the recreancy fine.

ii. 7. In the famous description of the institution of the grand assize read regalis ista constitucio instead of legalis ista institucio: — an interesting variant.

Add at the end of this chapter — Et statim accedat tenens in

¹ It is enough nowadays that the essoiner should pledge his faith without finding a more material pledge.

² Here and elsewhere notices of "the Bench" are interpolated.

³ Actions are being classified for the purpose of rules about essoins.

propria persona sua quia non habebit respectum nisi xv. dies, et data fide quod sit tenens et quod in magnam assisam se posuerit, et habebit hoc breue sequens.

ii. 9. Prohibe custodibus terre et heredis Baldewini de Riueris Comitis Deuonie . . .

The writs of peace are treated at greater length. The chapter ends thus—*Debent autem huiusmodi breuia irrotulari. Nullus vero tenens debet habere hec duo breuia "de pace de libero tenemento" et "de seruicio" per interpositam personam, hoc est per aliam personam quam per propriam, nisi sit de gracia, vel quia languidus, vel remotissimus et pauper.*¹

ii. 11. Add at end—*Notandum est quod in magna assisa non ponantur nisi milites et precipue [corr. precise?] iurare debent quod verum dicent, non addito verbo illo quod in aliis recognicionibus dicitur amuncient [i. e. a mun scient].*

ii. 17. . . . veritatem tacebunt, non addito hoc verbo quod in aliis recognicionibus adicitur, scilicet, amuncient. Ad scientiam autem

ii. 19. *ordinata not ordinaria.*²

iv. 4. After the writ of right of advowson comes—*Aliud breue fere simile quod dicitur Quare impedit.*³ Then follows a writ *De ultima presentacione.* Then cap. 5.

iv. 9. The bishop is to distrain the clerk—*et si episcopus hoc facere noluerit per iudicium curie debet dissaisiari de baronia sua et baronia ipsa tenebitur in manu domini Regis.*⁴ Tandem . .

. . . . eo ipso ecclesiam amittet? *Solucio:—Equidem non amittet ut inferius monstrabitur. Sin autem*

iv. 11. . . . remanebit assisa? Et non videtur quod ideo remanere debeat quia cum ille seisinam ipsius presentacionis aliquando habuerit eo quod ultimam presentacionem pater eius habuit, ergo quod recte petere possit seisinam patris eius non obstante aliquo quod factum sit de iure ipso presentandi. Si vero iterum

iv. 13. *Rex Priori de C. iudici a domino Papa delegato*

v. I. Marginal note—*Ad breue de natiuis sic potest obuiari,*

¹ If you put yourself on the grand assize, you must go in person for your writ of peace.

² This is a better reading of the original text.

³ The *Quare impedit* is not one of the oldest actions.

⁴ The bishops bitterly complained of this procedure, which made their baronies a security for the appearance of the clergy.

quod si ille qui ad vilenagium trahitur fugerit de terra domini sui ante ultimum reditum domini Johannis Regis de Hibernia in Angliam a clamore domini petentis petitus liberatur quia breue non valet.¹

. . . . breue de natiuis vicecomiti directum. On this follows a writ de natuo habendo.²

v. 2. Est autem breue tale quod dicitur breue de pace. [*Interlined*—uno modo antiquum breue formatum.] After this writ another—Aliud breue fere simile precedenti de eodem formatum:—the second writ ends with—et dic prefato H. militi quod tunc sit ibi loquelam suam prosecuturus versus predictum R. si voluerit, There is a small difference in form between the new writ and the old.

v. 5. Item si quis natiuus quiete sine aliqua reclamacione domini sui per unum annum et diem in aliqua villa priuilegiata ut in Suthamptona ut in dominico domini Regis manserit, ita quod in eorum comunam, scilicet, gildam tanquam ciuis receptus fuerit, eo ipso a vilenagio liberabitur.

v. 6. Idem est si ex patre libero et matre natua nisi fuerit patri libero desponsata.

Over the last sentence relating to the partition of the children—Jus antiquum.³

Marginal note—Natiuus potest tenere terram liberam habendo respectum erga diuersos dominos et non e contrario quod terra libera de natuo teneatur.⁴

vi. 4. The paragraphs about the actions of dower are recast. The action for dower unde nihil habet is more rapid than that by writ of right. Therefore the widow should not accept any part of her dower unless she can get the whole, so that she may be able to say "nihil habet."

vi. 10. At the end—Si quis heres infra etatem mulierem desponsat et eam dotat de omnibus terris et tenementis de quibus heres est, et de omnibus que acquirere potest, mortuo herede ipso infra etatem et antequam seisinam terre sue habuerit, poterit ipsa mulier dotem perquirere per legem terre per hoc breue "unde nichil habet," eo quod dominus heredis cepit homagium heredis

¹ This limitation was introduced in 1237; Bracton's Note Book, pl. 1237.

² Glanvill had apparently omitted to give the words of the writ.

³ It is no longer usual to divide the children between the two lords.

⁴ Free land may be held *by* a villain, but cannot be held *of* a villain.

infra etatem existentis, et eo quod si implacitaretur de terra heredis infra etatem existentis vocetur ad warantum ipsum heredem [*sic*].

vi. 17. The following passage is marked "Extra" in the margin — Unde si aliquis liber homo qui tenebat de marito dicte mulieris sine aliquo herede obierit, et ipse liber homo ipsi mulieri in dotem assignatus fuerit, ipsa mulier de terra que fuit dicti liberi hominis sine aliquo iuris impedimento liberam habebit dispositionem ad ipsam cuicunque voluerit dandam inperpetuum, saluo seruicio heredis quod ipse liber homo facere consuevit pro dicta terra marito dicte mulieris et eius antecessoribus.

vi. 17. . . . non remanebit assignacio dotis ipsius mulieris. Respondet autem qui infra etatem est de dote, de ultima presentacione, et de nova disseisina et de fide, si tamen infra etatem feofatus fuerit, respondet infra etatem si implacitetur.

vi. 17. . . . Sciendum autem quod si in vita alicuius mulieris fuerit ab eo uxor eius separata per parentelam vel ob aliquam corporis sui (id est, uxoris) turpitudinem, scilicet, propter fornicacionem et propter blasfemiam ut dicit aug' mag' [Augustinus Magnus?] nullam vocem clamandi dotem habere poterit ipsa mulier, et tamen liberi possunt esse eius heredes et de iure regni patri suo vel matri si hereditatem habuerit succedunt iure hereditario. Set si uxor ipsa fuerit separata ab ipso viro eo quod contraxit matrimonium ante cum aliqua alia muliere per verba de presenti dicendo "Accipio te in uxorem," "Et ego te in virum," tunc eius pueri non possunt esse legitimi nec de iure regni patri suo vel matri succedunt iure hereditario. Notandum itaque quod cum quis filius et heres

vi. 18. Omit from Si vero mulier aliqua plus to the end of the book.

vii. 1. The passage Si autem plures habuerit filios mulieratos is marked as Jus antiquum.

vii. 1. The passage Similis vero dubitatio contingit cum quis fratri suo postnato is marked as Lex antiqua.

vii. 1. consequuturus esset de eadem hereditate. [Extra] Si quis habeat duos filios et primogenitus filius fecerit feloniam et captus et imprisonatus et pater suus obierit, postnatus frater eius nunquam terram ipsius patris optinebit nisi primogenitus frater obierit ante patrem. Veruntamen

vii. 3. Item maritus primogenite filie, scilicet, cum habuerit

heredem et non ante, homagium faciet capitali domino de toto feodo pro omnibus aliis sororibus suis. Tenentur autem postnate filie

. . . . secundum ius regni, homagium tamen secundum quosdam tenentur mariti postnatarum filiarum facere heredi primogenite filie set non marito suo ut dictum est et etiam rationabile seruicium. Preterea sciendum est

. . . . nisi in vita sua. [Extra] Set si maritus ipse in uxore sua hereditatem habens [*sic*] puerum genuerit, ita quod viuus natus fuerit, post decessum ipsius mulieris hereditatem illam omnibus diebus vite sue tenebit, siue infans ille mortuus fuerit, siue non, et hoc secundum consuetudinem Anglie. Item si quis filiam habuerit heredem

vii. 5. . . . rationabilem divisum facere secundum quosdam sub hac forma, precipue secundum cuiusdam persone consuetudinem, ut hii qui socagium tenent et villani, primo dominum suum de meliore et principaliore re quam habuerit, recognoscat, deinde ecclesiam suam, postea vero alias personas secundum has leges Anglicanas et secundum alias leges, scilicet, Romanas. Mulier etiam sui viri voluntate testamentum facere potest.

vii. 7. [*Rubric*] Antiquum breue. De faciendo stare rationabilem devisum seu legatum alicuius defuncti.

vii. 8. Si quis autem auctoritate huiusmodi breuis predicti et modo moderno tempore vetiti¹ in curia Regis aliquid contra testamentum proposuit, scilicet quod testamentum ipsum non fuerit recte factum, vel quod res petita non fuerit petita ita ut legata

vii. 10. . . . veruntamen racione burgagii tantum vel feodi firme non profertur dominus Rex aliis dominis in custodiis, nisi ipsum burgagium vel ipsa feodi firma debeant servicium militare domino Regi.

vii. 12. . . . infra etatem, id est, infra xv. annos maiores, id est, de etate xv. annorum

Quia generaliter dici solet quod putagium hereditatem non dimittit. Et istud intelligendum est similiter de putagio matris quia filius heres legitimus est licet non fuerit filius viri sui quem nupcie demonstrent.

vii. 13. Heres autem omnis legitimus est, nullus vero bastardus legitimus est, vel aliquis qui ex legitimo matrimonio natus non est, legitimus esse non potest.

vii. 14. . . . et quoniam cognicio illius cause ad forum ecclesi-

¹ The ecclesiastical courts have won a victory since Glanvill's day.

asticum spectat [*instead of* et quoniam ad curiam meam non spectat agnoscere de bastardis].

vii. 15. A plea of special bastardy may be decided either in the ecclesiastical court or before the justices by an assize of twelve men.

vii. 16. . . . succedere debet quia dominus non succedet rationibus predictis in capitulo de maritagiiis. Dicendum est, ut dicunt quidam, quod illa terra remanebit in custodia dominorum capitulum quousque aliquis heres venerit ad ipsam clamandam. Si ipse qui eam dedit similiter bastardus sit et heredem de corpore suo non habeat, dicunt quidam quod dominus ipse si heredem non habuerit succedet et per hoc breue de eschaeta. [A writ of escheat follows.] Si quis autem intestatus decesserit omnia catalla sua domini sui [olim, *interlined*] intelliguntur esse, et tempore moderno domini Regis concessione domini Pape. Si vero plures habuerit dominos

vii. 17. Certain of the clauses as to the lord's right to hold the tenement when there is doubt between two heirs seem to be stigmatized as *Lex Antiqua*. Thus ad libitum suum. *Lex Antiqua*. Preterea si mulier aliqua

Sciendum quod si quis conuictus fuerit de feloniam et uxorem habuerit, ipsa uxor nunquam dotem habebit de terra que fuit viri sui de feloniam conuicti.¹

viii. 1. The indenture of fine is more fully described. There are three parts and the king keeps one of them.

viii. 2. The precedent is that of a fine levied at Westminster on the Vigil of S. Andrew in the 13th year of King Henry.

viii. 3. Et sciendum quod nulla terra potest incyrographari nisi data fuerit in perpetuum vel ad terminum vite alicuius.

viii. 9. Sciendum tamen quod nulla curia recordum habet generaliter preter curiam domini Regis. [Extra] Sciendum quod tres sunt homines in Anglia qui recordum habent, videlicet, iusticiarii, coronatores, viredarii, non alii. In aliis autem curiis

ix. 1. Et sciendum quod quando fit homagium domino, dominus capiet manus hominis sui similiter clausas sub capa sua vel sub alio panno, et homagio facto inuicem se osculabuntur.

Item quero utrum dominus possit distringere hominem suum veniendi in curiam suam sine precepto domini Regis ad respondendum de seruicio unde dominus suus conqueritur quod ei deforciat

¹ A very doubtful point in the thirteenth century.

vel quod aliquid de seruicio suo ei retro sit. Equidem secundum quosdam antiquos bene poterit id facere. Secundum alios modernos non poterit quod ad aliquem effectum veniat, quia homo ille non respondebit de alio [*corr.* libero] tenemento suo nec de hoc quod tangitur [*corr.* tangit] liberum tenementum suum sine precepto domini Regis, quia forte incontinenti tale ostendat breue. [A writ Precipimus tibi quod non implacites A. de libero tenemento suo] Et ita poterit inter dominum et hominem

ix. 2. pro solo vero dominio [*not* domino]¹

ix. 11. Ille autem purpresture que super dominum Regem in regia via probate fuerint per xij. patrie, licet in alio casu aliter fuerit iudicatum, nichilominus in misericordia domini Regis remanebunt hii qui purpresturas illas fecerint

. de suo honorabili tenemento [*not* contenemento]

. et non infra assisam fuerit, hoc est si assisam dominus inde perquirere non poterit, tunc distringetur ut veniat ex beneficio et granto domini Regis in curiam domini sui ad id recitaturum [*corr.* adreciaturum], scilicet, de adresser.² Ita dico

ix. 13. tempore H. Reg. tercii aui nostri Reg. H. filii Johannis Regis et per hoc sequens breue. Et sciendum quod istud breue in curia domini Regis non potest haberi nisi ipse diuise fuerint inter duas villas precipue, vel inter duo feoda et quod feoda illa diuersificarentur nomine, verbi gracia, La Scherde, Billingham. Et preterea dicunt quod ad istud sequens breue adaptari poterunt duellum et magna assisa.

ix. 14. At the end follows a writ directing a perambulation of boundaries.

x. 1. cum quis itaque de debito quod sibi debetur curie domini Regis conquiratur, si placitum ipsum ad curiam domini Regis, scilicet, ad comitatum, trahere possit et voluerit, quia illud placitare poterit in curiis dominorum suorum, tunc tale breue de prima summonicione habebit

The writ is not a Precepe but a Justicies to the sheriff. Instead of a sum of money a charter may be demanded: Eodem modo de catall [is], set catallum non oportet poni in breui nec debet, set eius precium quia diuersa catalla petuntur aliquando et non particule debiti separate, set coniunctim poni non possunt, set narrande sunt omnes particule debiti sicut debentur in placito quando breue inde placitatur, sic, Monstrat D. quod B. iniuste ei detinet unum

¹ A better reading.

The writer takes to his French.

quarterium frumenti de precio trium solidorum, et unam loricam de precio dimidie marce etc. Et sciendum quod si precium catallo-
rum xxx. marcas in breui excesserit, debet petens dare terciam par-
tem domino Regi per [*corr. pro*] hoc supradictum breue habendo
quia breue illud tunc non est de cursu.¹

The case may then be removed from the county court by Pone.

Si autem quis per consilium et auxilium curie domini Regis tale
sequens breue de debitis habendis perquirere poterit ut opus suum
cicius et melius expediat, tunc habeat tale breue. Then follows
a Precipe for 40 shillings, quos ei debet et unde queritur quod ipse
ei iniuste detinet.

x. 5. ex sequentibus liquebit. Si vero principalis vel capi-
talis debitor habeat unde reddere debitum illud et nolit cum possit,
plegii eius respondeant pro debito, et si voluerint habeant terras et
redditus debitoris quousque eis satisfactum fuerit de debito quod
ante pro eo soluerunt, nisi capitalis debitor monstauerit se inde
esse quietum versus eosdem plegios. Et si ipse debitor paratus sit
de debito illo satisfacere, plegii ipsius debitoris non distringantur
quamdiu ipse capitalis debitor sufficiat ad solucionem debiti, nec
terra vero nec redditus alicuius seisiatur pro debito aliquo quamdiu
catalla debitoris presencia sufficiunt ad debitum reddendum. Then
follows a writ of Justicies to compel the principal debtor to acquit
his sureties. This writ may be removed from the county court to
the Bench. Some say that it will not be granted for a sum of more
than 40 shillings except as a favor. Solutio eo quod debetur ab
ipsis plegiis

Dicunt autem quidam quod creditor ipse suo et legitimorum
testium iuramento poterit hoc debitum de iure probare versus
ipsum plegium, nisi plegium ipsum curia ipsa velit ad sacramentum
leuare,² quod potius accidit, olim autem ante legem vadiatam in tali
casu ad duellum perueniebatur. [c. 6] Inuadiatur autem res

x. 6. Si autem in custodia sua deterius fuerit factum infra
terminum per talliam [*instead of per culpam*]³ ipsius creditoris
computabitur ei in debitum ad valenciam deterioracionis

x. 11. precium mihi restituendum. Omit the rest of c. 11.

x. 15. si certum vocauerit warantum in curia quem dicat
se velle habere ad warantum, tunc dies ei ponendus est in curia, illo

¹ See Harvard Law Review, iii. 112.

² I doubt our author understood what Granvill meant by "a sacramento leuare."

³ This variant from the received text looks like a mere blunder.

tamen emptore retento in prisiona, quia hii homines qui rettati sunt solum de latrocinio per inditamenta et si imprisonati fuerint per legem Anglie, nulla eis facta [*corr.* facienda] est replegiacio, nec etiam de eis qui rettati sunt de morte hominis si imprisonati fuerint, sine speciali precepto domini Regis. Si vero ad diem illum
 . . . nisi warantus ille alium warantum vocauerit et cum venerit ad quartum warantum erit standum.¹

x. 17. Passage marked Extra — Item si quis captus fuerit cum aliqua re furata ipse qui furtum illud fecit non potest defendere se per duellium, ita quod dicat quod illam non furatus fuit, set si dicat quod res sua propria est bene potest ut dicunt quidam. Item si quis captus fuerit pro morte hominis, non potest iudicari de iure nisi voluerit se super veredictum visnetorum ponere, et si hoc voluerit [*sic*] seruabit prisonem. Si vero incertum vocauerit quis ad warantum

x. 18. sed quid si conductor censum suum statuto termino non soluerit, nunquid in hoc casu licet locatori ipsum conductorem sua auctoritate expellere a re locata? Responsio, licet, si talis inter eos fuerit facta conuencio. [Here ends this book.]

xi. 3. extraneus extraneum uxor quoque marito. Here begins a new "treatise," De placitis que per recogniciones terminantur. It almost at once becomes a mere series of writs. The following notes may give a fair idea of its contents.

1. Novel disseisin; Limitation post primam transfretacionem nostram in Britanniam. Variations and notes.

Et sciendum est quod qui in seisina bona et placabili fuerit per unum diem, scilicet, ab aurora diei usque ad crepusculum, vel qui in seisina fuerit ut dictum est per unum diem et unam noctem, et inde eiectus fuerit, poterit recuperare per breue noue disseisine sine dubio Differentia est inter feodum et tenementum; feodum est quod hereditabiliter tenetur; tenementum quod ad terminum vite tenetur. Dicitur autem tenementum, terra, mesuagium, redditus, molendinum, morra, marleria et alia consimilia.

2. Mort d'Ancestor; Limitation, last return of John from Ireland. Variations and notes.

3. Utrum. Note. Preterea sciendum est quod predicta communia placita ut recognicio de noua disseisina et de morte antecessoris non sequuntur coram iusticiariis domini Regis nec coram domino Rege, nec ad bancum, set in aliquo certo loco teneantur et capi-

¹ There is reason to believe that this is the true reading.

antur ut in suis comitatibus.¹ Assise autem de ultima presentacione semper capiantur coram iusticiariis de banco et ibi terminentur.

4. Last presentation.

5. Attaint. Et sciendum quod istud predictum breue nunquam a domino Rege vel eius iusticiariis alicui conceditur sine dono, nisi de gracia, si sit pauper; et si petens conuictus fuerit, ibit ad prisonam, si vero lucratus fuerit, primi xij. iuratores imprisonantur donec ibi finem fecerint.

6. Redisseisin.

7. Disseisin; a special case.

8. Writs of right—addressed to the guardian of the heir of Baldwin, Earl of Devon, also to the bailiff of Abbot of Lyra.

Et si mesuagium petatur in aliquo burgagio tunc addatur hec clausula nisi redditus et edificium valeant per annum plus quam xl. solidos, quos clamat tenere de te in liberum burgagium.

Et notandum quod seruicium quod est in denariis non debet extendere [*corr.* excedere] xl. solidos et seruicium militare non debet esse minus quam medietas feodi unius militis, quia si fuerit seruicium minus quam medietas feodi unius militis vel supra pro vero tunc non est breue de cursu.²

9. Recordari facias. De falso iudicio.

10. Customs and services.

11. Mesne.

12. Account against bailiff or steward.

13. Quod permittat for easements and profits.

14. Entry. Many forms, including the *cui in vita*. The wife can be barred by her fine; si vero mulier ipsa coram iusticiariis de banco vel itinerantibus penitus virum suum contradixerit, cirographum de maritagio vel hereditate illa nunquam leuetur.

15. Warantia carte.

16. Protecting infants against litigation.

17. Covenant.

18. Escheat.

19. Ward.

20. Breue de occasione. This is *Quare eiecit infra terminum*.

21. Appointment of attorney.

22. Writs to bishops and prohibitions to Court Christian. Writs for arrest of excommunicates.

¹ Apparently a false interpretation of a famous clause in the Great Charter.

² Compare Harvard Law Review, iii. 110. The writer seems to have turned the rule inside out.

23. Replevin. De homine replegiando.
24. De rationabili parte.
25. Cosinage.
26. Dower ex assensu patris, etc.
27. Admeasurement of dower.
28. Admeasurement of pasture. Et sciendum quod homo non debet impetrare breue de admensuracione pasture super dominum suum.
29. Appeals of felony.
30. Trespass. Assault. Assault on plaintiff's wife.
31. Trespass by breach of pigeon house, by fishing in plaintiff's fishery, by breach of park and taking wild animals. Notandum quod qui conuictus fuerit per istam proximo dictam inquisitionem, non perdet vitam nec membra, eo quod columbe non sunt penitus domesticæ, nec pisces, nec etiam bestie, sicut boues, equi, vacce et huiusmodi talia.
32. Writ directing that *A* shall have the king's peace, and that *B* do find pledges to keep the peace.
33. Trespass.
34. Replevin.
35. Writ of right. How the lord's court is to be falsified — Taliter autem probetur ipsa defalta, et sic abiuret curiam domini capitalis. Veniet ipse petens cum balliuo ipsius hundredi ad curiam dicti domini capitalis, et feret breue suum in manu sua et unum librum si voluerit, et stet super limitem illius curie et iuret super librum quod amplius per illud breue quod tenet in manu sua in curia illa non placitabit et quia illa curia ei defecit de recto, et tunc habebit breue balliuorum ad vicecomitem quod curiam illam abiur[auit] et defaltam probauit.
36. Odium et atia.
37. Quo iure.
38. Escheat.
39. Pone in replevin: Baldwin de L'Isle and William de L'Isle concerned.
40. Geoffrey parson of Serewelle [Shorwell, Isle of Wight], is in trouble for having procured the excommunication of Jordan of Kingeston who had brought a writ of prohibition against him. The writ is tested by R. de Turkebi.¹

¹ Roger Thurkelby, justice of the Bench in the middle part of Henry III.'s reign. He died in 1260.

41. Writ after judgment in a novel disseisin.
 42. Revocation of writ ordering capture of an excommunicate.
 43. Quod permittat habere pasturam for Walter Tho' the rector of the church of Arreton [Isle of Wight] against the Abbot of Quarr.¹

44. Trespass.

45. Novel disseisin.

46. Entry.

47. Aiel.

48. Casus Regis. P. habet duos filios, D. primogenitus est et A. postnatus. D. habet filium B. heredem et D. decedit, et P. decedit et capitalis dominus ponit in seisinam A. postnatum, et B. filius D. perquiret predictum breue de auo.²

49. Waste.

50. Habere facias seisinam.

51. Trespass and imprisonment.

52. Contra forma feoffamenti. Henry of Clakeston and Alice his wife against William de Lacy. Recital — cum consilio fidelium nostrorum provideri fecerimus et statui necnon per totum regnum nostrum publicari ne qui occasione tenementorum suorum distringantur ad sectam faciendam ad curiam dominorum suorum nisi per formam feofamenti sui ad sectam illam teneantur, vel ipsi aut eorum antecessores tenementa illa tenentes eam facere consueverunt ante primam transfretacionem nostram in Britanniam etc.³ The king is H. dei gracia Rex Anglie, Dominus Hibernie et Dux Aquitanie.

Explicit summa que vocatur Glaunvile. This apparently by the same hand but in different ink. Then immediately a writ issued by H. King of England, Duke of Normandy etc. to B. de Insula. Then a count in an imaginary writ of right from the time of Henry III. Then the form of prohibition known as Indicavit issued by Henry when no longer Duke of Normandy concerning John vicar of Sorewelle, Jordan of Kingeston and William de L'Isle. Nota quod nullum tenementum potest incirographari in curia domini Regis alicui infra etatem existenti.

¹ In 1266 Walter Tholomei, rector of Arreton, executed a deed of exchange with the Abbot of Quarr, Hasley's Isle of Wight, App. p. cxxxvi.

² This is the case of King John and Arthur; P = Henry II.; D = Geoffrey; B = Arthur; A = John. See Bracton, f. 267 b, 282, 327 b, where the casus Regis is discussed.

³ See Provisions of Westminster (1259), c. 1.

Item sciendum quod si quis perdiderit loquelam per paralysim et impotens sui fuerit, dominus Rex ponet custodem ad ipsum custodiendum et bona sua et dominus Rex nichil inde capiet. Et tribus de causis erit in custodia domini Regis, quia non debet esse in tuicione domini capitalis, quia dominus capitalis posset forte aliquid alienare de tenemento suo ad exheredacionem heredis. Item non debet esse in custodia heredis quia forte heres mallet ipsum esse pocius mortuum quam viuum. Item non debet esse in tuicione uxoris sue licet uxorem habeat, set in tuicione domini Regis, quia si esset, tunc optineret uxor dominium tocus ipsius tenementi, set per custodem domini Regis ut domina habebit racionabile estouerium suum. Et ita se habet lex Anglie siue tenuerit de domino Rege, siue non. Et si ipse implacitatus fuerit, ipse respondet pro eo qui positus fuerit ex parte domini Regis.¹

Si quis uxorem suam occiderit et conuictus inde fuerit, omnia bona ipsius conuicti erunt domini Regis, tamen per legem Anglie ipsa mulier que occisa fuerit partem suam catallorum mobilium habebit.²

A page and a half of blank parchment. Then Capitula Itineris of 40 Henry III. Then other capitula as pleaded by Roger de Turkebi. The Assize of Bread and Beer. The correspondence between the King and the Barons before the battle of Lewes. Account of the battle of Lewes. Statement that the following page was written by the hand of Robert Carpenter of Hareslade at Whitsuntide 1265. Precedent for a will. A few legal notes in French. End of a quire.

In another part of the MS. (f. 87) there is a curious form of prayer apparently intended for the use of litigants "sic me presens iudicium fac peragere, ut in tempore probacionis victor valeam apparere per Te, Saluator Mundi, qui uiuis et regnas Deus per omnia secula seculorum. Amen. Pater noster, usque ad finem ter in honore Patris et Filii et Spiritus Sancti, et similiter eodem modo ter Pater noster in honore Raphaelis Archangeli, et similiter eodem modo ter Pater noster in honore Sancti Ezechielis Prophete, ut in placito tuo victor valeas existere, cum Aue Maria similiter dicta."

¹ This is an important note. The king's right to act as guardian of idiots and lunatics can, I believe, be traced to the last years of Henry III. and no further. See *English Historical Review*, vi. 369.

² This curious note tends to show that at this time our law of husband and wife still entertained some notion of a community of goods. A man murders his wife and is hanged; the wife's share of movables is not forfeited, but goes to her kinsfolk.

SOME DEFINITIONS AND QUESTIONS IN JURISPRUDENCE.

IN every branch of knowledge a tolerably accurate terminology is not only an aid to progress, but is also a preservative from corruption. A loose vocabulary is a fruitful mother of evils. It would be difficult to overestimate the harm wrought by the ambiguity of such terms as "the church" in theology, and "humors" in medicine.

In law, however, the evil of lax definitions, though real, has not been without compensation. Men are very ready to accept new ideas, provided they bear old names; and the indefiniteness of many legal terms has been the cover under which improvements have been worked insensibly into the law, — improvements which would have been made more slowly, if at all, had the terms borne a more rigid meaning. If the words "contract," "consideration," "tort," "trust" had been defined by Statute four hundred years ago, a serious obstacle would have been put in the way of legal development.

As knowledge grows in any department, the classification in that department changes; and with a change in classification is involved a change in the meaning of terms.¹ So long as the object of knowledge is alive, there can be no final definitions; and it is the truth of this which furnishes so strong an argument against schemes of codification. But although it be true that classification must and ought to change as the law grows, and an official attempt to fix it is pernicious, it by no means follows that it should not be unofficially investigated.

If we are moving in the right direction, there is a constant possibility of improvement in stating and arranging the law; and although we recognize, in all humility, that any statement and arrangement will some time be superseded, it is a step for further advance to see what has been won from chaos already.

The analysis of the general conceptions of our law is not a study which has much flourished in England or America. There was little of it before the time of Bentham and Austin. Austin's book

¹ 1 Mill, *Logic* (9th ed.), 159.

was known to but a narrow circle, and had become a bibliographical rarity when it was republished by his widow, with additions, in 1861. It was then considerably in vogue until 1874, when Sir Henry Maine dealt it a severe blow in his last two lectures on the "Early History of Institutions," since which time its credit has been sensibly shaken.

Later excellent treatises have been published by Professor Holland and Sir William Markby, and valuable essays by others, notably by Sir Frederick Pollock in a collected volume, and by Mr. Justice Holmes in the "*American Law Review*;" but aside from books intended for practitioners, the writers who in England and America have illustrated the jurisprudence of our generation have approached the law mainly from the historical side.

The brilliant results of research into the history of the law, the fascinating character of the research itself, and the general acceptance, often in an extravagant form, of the philosophy of evolution, have drawn attention to the change and growth of the law, and away from the elements of permanence which it contains. It is rather the question of how law has become what it is, than the question of what it in fact is now, that has attracted the attention of writers. It has been the growth of the tree of the law, and not the appearance of a cross section at the present or any other time that has occupied them.

I by no means regret this, and I fully recognize the fact that legal conceptions are constantly changing; yet, to borrow a figure from the shop, it seems well at times to take account of stock, and to consider where legal studies and investigations have in fact brought us, although we believe it is neither possible nor desirable to prevent their carrying us farther.

Besides, as one should remember, though most legal conceptions alter, and there may be few which are so based on eternal principles that they cannot change while the order of nature continues, yet their change is often exceeding slow, and many of them go back as far as we have a clear knowledge of human affairs, and show to our eyes no signs of decay.

The analytical study of the general conceptions of the law is not, as experience has shown, without its dangers. It may easily result in a barren scholasticism. "*Jurisprudence*," as Mr. Dicey says,¹ "is a word which stinks in the nostrils of a practising barrister. A

¹ 5 *Law Mag. and Rev.* (4th series), 382.

jurist is, they constantly find, a professor whose claim to dogmatize on law in general lies in the fact that he has made himself master of no one legal system in particular, whilst his boasted science consists in the enunciation of platitudes which, if they ought, as he insists, to be law everywhere, cannot in fact be shown to be law anywhere." But, as Mr. Dicey in the same article goes on to show, "prejudice excited by a name which has been monopolized by pedants or impostors should not blind us to the advantage of having clear and not misty ideas on legal subjects."

Especially valuable is the negative side of analytic study. On the constructive side it may be narrow and unfruitful; but there is no better means for the puncture of wind-bags. Most of us hold in our minds a lot of propositions and distinctions, which are in fact identical, or absurd, or idle, and which yet we believe or pretend to ourselves to believe, or impart to others, as true and valuable. If our minds and speech can be cleared from these, it is no small gain.

This is the great merit of Austin. His style is inexpressibly wearisome. He himself once expressed a doubt whether his love-letters were not written in the fashion of an equity draughtsman; and certainly his treatise is in manner more like the charging part of a bill in equity than any other kind of human composition. The insolence of his language also—though very likely not of his thought—is often offensive, and the theories which he advanced have not remained unshaken. But his unwillingness to let others juggle with words or to juggle with them himself, or knowingly to leave any dark corner of a subject unexplored, have never been surpassed, and to many students have made the reading of his crabbed book a lesson in intellectual morals.

I wish in this article to put one or two definitions and propositions, rather as suggesting them for consideration, than as positively affirming them to be true.

I. JURISPRUDENCE IS THE SCIENCE WHICH DEALS WITH THE PRINCIPLES ON WHICH COURTS OUGHT TO DECIDE CASES.¹

Every society or organized body of men must have a judge or judges to determine disputes. Sometimes the duties of judge are united in the same person with other official duties. The more

¹ It may be urged that this definition is much as if medicine were defined as the science which deals with the principles on which physicians ought to diagnose and treat

civilized the society becomes, the more do the functions of a judge come to be exercised apart from other functions.

"The law" or "the laws" of a society are the rules in accordance with which the courts of that society determine cases, and which, therefore, are rules by which members of that society are to govern themselves; and the circumstance which distinguishes these rules from other rules for conduct, and which makes them "the law," is the fact that the courts do act upon them. It is not that they are more likely to be obeyed than other rules. I am much more likely to drive over a country bridge at a gait faster than a walk than I am to wear a nose-ring, although the former is against the law, while the latter is not. It is not that they relate to more important matters. To take Macaulay's instance, it is against the law for an apple-woman to stop up the street with her cart; it is not against the law for a miser to allow the benefactor to whom he owes his whole success to die in the poor-house. Acts are against the law or not against the law in any case because the courts will or will not enforce the rules of conduct with which such acts conflict.

It may be said that "the law" comprises the rules of conduct which are authorized or enforced by the State whether through the courts of law or not. Thus it is the law that I can shoot a burglar who is breaking into my house, or can call upon a policeman for aid against a robber. But the limits of this right to self-help and to aid from the executive officers of the State are defined by the courts; and the courts, by preventing any one taking action against me for the shooting of the burglar or the arrest of the robber, are the authorities through which the State ultimately enforces all rules of conduct which it does enforce.

The power, then, of a man to have the aid of the courts in carrying out his wishes on any subject constitutes a legal right of that man, and the sum of such powers constitutes his legal rights.

I. I have approached the subject of jurisprudence from the side of the courts, and have defined it with reference to them. Austin and his followers make the idea of the sovereign the central idea of jurisprudence.

diseases, that it is, so to speak, a clinical definition. If physicians occupied the same position towards the laws of nature as judges do towards the law of the land, and had received commissions from the Creator as official expounders of those laws; if when a board of doctors said that a man had a colic, he *ipso facto* did have a colic, — then the cases would be similar, and the definition of medicine not, I conceive, objectionable.

Jurisprudence, according to Austin, is the science of positive law ; positive law is the aggregate of positive laws ; and positive laws are the sanctioned commands of the sovereign. That there is much positive law made by judges he does not deny, but he brings all such law within his definition by aid of the proposition that the judges, in so making law, are acting as agents of the sovereign.

But this meaning of the term "jurisprudence" is not the meaning which it commonly bears.

That a positive law is the command of the sovereign will be generally acknowledged ; but "the law" which is the subject of jurisprudence is not, as the term is generally understood, the aggregate of these commands ; it does not comprise all these commands, and it does comprise much besides.

A. "*The law,*" which is the subject of jurisprudence, does not comprise all the commands of the sovereign. Nothing is more plainly a command of the sovereign than the manual of infantry tactics or the regulations for making post-office returns ; and these would be, under Austin's definition, most important parts of the science of jurisprudence ; yet, as the term is ordinarily understood, they certainly do not come within its scope.

It cannot be said that such commands are local and special, and therefore unfit for general jurisprudence. A comparative science of infantry tactics is perfectly possible ; so is a general science which should comprise the general principles involved in all actual systems of tactics, — indeed, he would be a bold man who would deny that some of the principles of the goose-step and of the manual of arms go down to the roots of human nature quite as deep as many of the principles in the law of contracts or of torts.

And if jurisprudence, defined as the science of the commands of the sovereign, is to be extended to include judge-made law, it ought to be extended to include colonel-made and postmaster-made law, and to all general rules made by officers of the sovereign.

But the manual of tactics is really no part of jurisprudence. Jurisprudence includes those commands of the sovereign, the main object of which is to define and enforce rights. It does not include those commands, the main object of which is to furnish the machinery for effecting other ends ; for instance, the building of roads, the distribution of letters, the maintenance and drilling of an army. To determine the main object of many commands is not

always easy; and therefore the precise line of demarcation between those commands which fall within the province of jurisprudence, and those which do not, may be hard to draw, but practically, most cases will give no trouble: the manual of tactics certainly falls outside.

B. "*The law*," which is the subject of jurisprudence, comprises much besides the commands of the sovereign. That "the law" is made up largely of judge-made law, all agree; Austin brings judge-made law under the commands of the sovereign by his apothegm that the judge in making law is acting as a delegate of the sovereign. The forced character of this rule has always been a stumbling-block in the way of his disciples, and Sir Henry Maine has shown that in some societies it cannot, by any forcing, be brought into accordance with the facts.

"It is founded on a mere artifice of speech, and assumes courts of justice to act in a way and from motives of which they are quite unconscious. . . . There have been independent political communities, and indeed there would still prove to be some of them, if the world were thoroughly searched, in which the sovereign, though possessed of irresistible power, never dreams of innovation, and believes the persons or groups, by whom laws are declared and applied, to be as much part of the necessary constitution of society as he is himself. There have again been independent political societies in which the sovereign has enjoyed irresistible coercive power and has carried innovation to the farthest point, but in which every association connected with law would have violence done to it if laws were regarded as his commands. . . . Let it be understood that it is quite possible to make the theory fit in with such cases, but the process is a mere straining of language. It is carried on by taking words and propositions altogether out of the sphere of the ideas habitually associated with them."¹

One decided gain in approaching the law from the side of the courts instead of from that of the sovereign is that the determination of the sovereign in a particular society is often a matter of extraordinary difficulty, while no such trouble exists in the case of courts.

Another advantage in connecting jurisprudence with the courts as its central idea, instead of with the sovereign, is that it then corresponds with the learning which is held by a particular class in the actual constitution of a community. We do not go to a judge

¹ Maine, *Early History of Institutions*, 364, 365.

or to a lawyer to learn how many inches the recruit's step should be, nor on what blanks a postmaster should make his returns. But it *is* the function of judges and lawyers, which they more or less fulfil, to know the rules by which courts ought to decide cases.

Closely connected with Austin's idea of referring jurisprudence to sovereignty is his theory that a sovereign has no rights. This, like his notion of judge-made law emanating from the sovereign, has wrung but a reluctant assent from his followers.

He reaches his result thus: A person has a legal right when another or others are bound or obliged by the law to do or to forbear towards or in regard of him. To every legal right there are three parties, — "a party bearing the right; a party burdened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed." A legal right is the creature of law, of a sovereign command; and as a sovereign cannot issue commands to itself, so a sovereign can have no rights.

If, however, we define a right by saying that "a person has a legal right when another or others are compelled by the courts to do or to forbear towards or in regard of him," then the sovereign has rights, and the nomenclature of jurisprudence corresponds to legal and common parlance.

2. Jurisprudence, then, is the science which deals with the principles on which courts ought to decide cases. The deontological element has often been excluded from the definition of jurisprudence; it has been declared that jurisprudence is not like ethics, the science of what ought to be, but simply the science of what is.

"Jurisprudence is concerned with positive laws, or with laws strictly so-called, as considered without regard to their goodness or badness."¹

"This distinguishes the science in question from the science of legislation, which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted."²

Jurisprudence "is the science of actual, or positive law."³

But this is not the meaning commonly attributed to the word, nor does there seem any reason for excluding the element of what

¹ Aust. (4th ed.) 176, 177.

² 2 Aust. (4th ed.) 1107.

³ Holland (5th ed.), 12.

ought to be ; for by excluding that element, we exclude the whole future of the science, and shut it up to a dry enumeration of past achievements. To do so is like confining chemistry to the elements and compounds already known, and saying to an investigator who is in search of some new combination that he is stepping outside the limits of the science.

Suppose two tribunals of co-ordinate authority in the same country have pronounced opposite opinions, and the supreme judicial authority may not have spoken. Suppose, for instance, that two Circuit Courts of the United States put opposite interpretations on the same Statute, and the Supreme Court has never had the question before it, does not the jurisprudence of the United States extend to the consideration of how that question *ought* to be determined ?

Again, a question may not have been decided in the courts of a country ; for instance, in Massachusetts the effect of certifying a check on the drawer's liability has never been determined : but would not a Massachusetts "jurist" be strictly within his province in considering it ? Is it the "practitioner" only who is entitled to have an opinion upon it ?

Thus to limit jurisprudence is to take from it its chief interest and glory. The supposed immutability of its principles was what once gave it its dignity and charm ; to-day it owes them rather to its possibilities and prospect of boundless development.

II. MUCH IN THE LAW THAT IS COMMONLY ATTRIBUTED TO CUSTOM OUGHT REALLY TO BE ATTRIBUTED TO THE OPINIONS OF THE JUDGES ON QUESTIONS OF MORALITY.

It is such a commonplace that (apart from Statutes) custom is the source of the law, or, indeed, is the law itself, that this proposition will to many seem paradoxical.

What, then, are the sources of the law, or, in other words, the sources from which courts draw the rules by which they decide cases ?

1. The commands given, through its legislative organs, by the State, whose judicial organ the court is.¹

There is in each State a person, or generally a body of persons,

¹ If a State, through its legislative organ, issues a command that it has been forbidden to issue by a person or body which the courts of the State consider as having political authority superior to the State, then those commands will be disregarded by the courts. This is the case in confederated States.

which is the main legislative organ, — a Parliament, Congress, Cortes, Assembly. But other persons or bodies are also charged with legislative functions (usually of a less weighty character); for example, the head of the administration of a State has often power to issue proclamations or orders; a city can make ordinances; the courts themselves can regulate procedure; thus the power of the Supreme Court of the United States to make rules for the conduct of equity and admiralty causes in the Federal courts is, as exercised, a legislative power of great extent and importance.

It is unnecessary here to consider when Statutes begin to be in force, and when they cease to be so. As long as they continue they are binding on the judges.

2. After legislation come *precedents*. When a legal point has once been decided in a case by a court of law in any State, that decision is a reason for the point's being determined in the same way by every court of that State which is not of higher authority. That such a decision should have a weight apart from its intrinsic merits, is almost a necessity in any system of law; but the degree of weight varies very much in different systems, — it is much greater, for instance, in the common than in the civil law.

3. Decisions on the same point by inferior tribunals in the same State or by the courts of other States may also have an artificial importance beyond their intrinsic excellence. Here, however, the range is broader, and sometimes the added value is next to nothing. For instance, in a case before the Court of Appeals of New York, the fact that the point involved had been ruled one way or another by a justice of the peace in a remote country village would be of almost infinitesimal importance; but on the other hand, if a point of commercial law had been determined in the same way by the courts of all of the United States but one, in which one it had never arisen, this unanimity of decision would be well-nigh conclusive with the courts of that one State when the question should at last come before them.

4. Next come the treatises; these, again, carry much greater authority in some systems of law than in others; for instance, in the civil than in the common law.

5. The processes of inferential and analogical reasoning by which the courts evolve new principles from old cases. These are well discussed by Mr. E. R. Thayer in an article on "Judicial Legislation" in the last volume of this review.

6. That the above-named are sources of the law, no one will dispute. But they are not all the sources. What is the remaining one? The common answer is, Custom. I venture to think that custom, as such, has comparatively little influence on the law, and that the great additional factor is the opinions of the judges on questions of morality. In morality, I may as well say once for all, I include public policy; that is, what *ought* to be done for the good of the community.

How should a judge—how, in fact, does a judge—decide a case? *First*, he sees whether there is any Statute on the subject; if there is, that concludes him. *Secondly*, he seeks for precedents binding him, which, either directly or by necessary reasoning or controlling analogy, involve the determination of the case. If he finds such, that is the end of the matter. His conscience has been called into action only so far as to require him to bring an honest and unprejudiced mind to the interpretation of the Statutes and precedents; he may think the Statutes and precedents immoral, but he has no compunction in following them. Grant intellectual honesty to the Devil, and the Devil, going so far only as we have already gone, would make an excellent judge.

Thirdly. But suppose the judge finds no Statute and no precedent governing the case, what is he to do? He must decide it somehow. Occasionally a question may come before a court where the scales hang perfectly even, where the moral considerations on one side exactly balance the moral considerations on the other. Again, a question may arise which has no conceivable moral aspect; but such questions are so few that they may be safely neglected. The case being then before the judge, and he being of opinion that sound morality requires that judgment should be given, say, for the plaintiff, does he not, and ought he not, to decide accordingly? What can be a justification for deciding against what he thinks good morals call for? It is a justification, we have seen, that there is a Statute or binding decision the other way. But is there anything else which is a justification? Is it a justification that a custom prevails in the community of doing acts which the judge thinks, if there were no such custom, ought to be restrained by the law as immoral? Suppose a judge should say: "Here is a practice in support of which there is neither Statute nor precedent; it is a practice which I should restrain as immoral, except for the fact that it *is* a practice; but as it is a practice, I shall not restrain it." Ought a judge so to act? Do judges so act? Would not a judge

intentionally sacrificing his own ideas of what is right to the popular practice be deemed to have failed in his duty? Doubtless what is right conduct varies with circumstances. Thus it is a duty not to needlessly wound another's feelings; but an act may be conventionally an insult in one country, whereas in another country it may be indifferent or complimentary, and therefore it may be against public policy for the courts of the former country to allow the act to be committed, while no such view of public policy may obtain in the latter. The same act may be moral under some circumstances and immoral under others; but it is the morality or immorality of the act, and not the fact that the circumstances are so or otherwise, that determines and should determine the judgment of a court.

A court generally decides in accordance with custom, because a community generally thinks its customs right, and a judge shares the moral sentiments and prejudices of the community in which he lives: the custom and the judge's ethical creed are usually identical; but which of the two is the real source of the law is shown in the cases where they differ. Where the custom is one way and the judge's judgment of what is moral is another way, the judge follows the latter, and disregards the custom. He would not so disregard a precedent, still less a Statute. Judges constantly are following Statutes and precedents which they consider pernicious; but has it ever been heard that a judge declared a custom to be without precedent in the courts and pernicious, and yet followed it? On the contrary, judges constantly refuse to follow customs which they deem unreasonable, *a fortiori* customs which they deem immoral; that is, they set their judgment of whether a practice is reasonable and moral higher than the mere fact of the practice as a source of law.

It may be said that although customs, as customs, are not much taken up into the law at the present day, they were so formerly. Perhaps they were; the subject is worth careful examination. Meanwhile it is well to bear some things in mind.

1. Probably in the early times to trace the descent of law from custom is often to reverse the real historical process.

"A custom [is] a conception posterior to that of Themistes, or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them."¹

¹ Maine, *Anc. Law*, 5.

2. So far as mercantile customs have been adopted into the common law, it has been upon the same grounds on which evidence of usage in particular trades is to-day admitted; that is, to carry out the intention of the parties. In the case of sale on the Stock Exchange, a court allows evidence of the usages of the Exchange to be given, not because it cares in the least for those usages as usages, but because they are facts relevant in the case to show the intention of the parties, and the moral sense of the judges feels that justice requires such facts to be taken into account. This same reason—the moral sense of the judges that honesty and fair dealing require it—explains the taking up of the customs of merchants into the law; and accordingly, as we should expect, these customs relate to matters of contract.

3. With a great part of the law the customs of the people have obviously had nothing more to do than have the motions of the planets. The enormous mass of the law of pleading and of evidence has been born and bred within the four walls of a court. The community at large, those who make custom, know absolutely nothing about it. So with a great part of those legal rules which are not plainly of an ethical character. For instance, is the rule in *Shelley's Case* a product of "the common conscience of the people;" or the rule that "dying without issue" means on an indefinite failure of issue; or is the rule that a parol promise without a consideration cannot be enforced, a spontaneous evolution of the popular mind? When the rules of common law and chancery differ, which are to be considered those "of which the people have the knowledge of the necessity as law"? In New York a contract is, I believe, complete when a letter of acceptance is mailed; in Massachusetts, not until it is received. Is the common conscience of the people of New York different on this point from the common conscience of the people of Massachusetts? Does the fact that A, B, and C, happen to be judges instead of D, E, and F change the ideas "of which the people have knowledge of the necessity as law"? In truth, the theory that custom is the parent of the non-legislative part of the law seems to weaken the more one applies it to actual instances.¹

¹ So far as the law has been already determined, it seems proper to say that Statutes, precedents, and the opinion of judges on questions of morality have been its principal sources; but when we are speaking of questions yet unsettled, it is perhaps more correct to say that the sources for their determination are Statutes, precedents, and the principles of morality, and to speak of the judges as Mr. Carter does in his admirable address on the "Provinces of the Written and Unwritten Law," as discoverers only of those

The formative elements, then, of the law are mainly legislation and the opinion of the judges on matters of ethics and public policy; the effect of the latter is often obscure, and judges themselves have a deprecatory habit of minimizing it, and of speaking as if their sole function was to construct syllogisms; but, to say nothing of former times, a great part of the law of this century is due to the opinions of individual judges on ethical questions. This, as I have said, is not obvious on many points, for on many points all decent people are agreed; but where there is room for difference of opinion, it becomes plain how much of the law is due to the notions of morality and policy held by particular courts. A great part of constitutional law comes under this head. Few constitutional questions have been decided, because the rules of logic necessitated the results reached; and in many cases the application, in addition, of the ordinary rules of interpretation would not have enabled the courts to come to their conclusions. It is a curious matter of speculation how different might have been the development of constitutional law if Chief-Justice Marshall had been as ardent and relentless a republican as he was a federalist.¹

So beyond the realm of constitutional law. The article of Mr. Thayer, above referred to, shows very clearly what a hand the notions of the courts on public policy have had in extending and limiting the doctrine of *Rylands v. Fletcher*; so too as to *Lumley v. Gye* and as to the whole domain of the non-liability of masters for the acts of fellow-servants. Again, the allowance of spendthrift trusts in Pennsylvania and Massachusetts; the permission to men to give property to their wives, so that on their insolvency their creditors may not get it; the preference of domestic to foreign creditors; the refusal to carriers of leave to contract against the negligence of their servants, — are all cases, and there are innumerable others, where American courts, unfettered by legislation or precedent, have made law in accordance with their views of what sound ethics required or permitted.

principles. The point that I have desired to make in the text is that it is the judges who have been mainly the discoverers of these principles, and not "the common conscience" of the people.

¹ I am indebted to Mr. Justice Holmes for the following quotation from a pamphlet by Bishop Hoadley in the Bangorian controversy, which shows that gentlemen of the short robe have sometimes grasped fundamental legal principles better than many lawyers: "Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the *Law-Giver* to all intents and purposes, and not the person who first wrote or spoke them."

III. PARTICULAR, COMPARATIVE, AND GENERAL JURISPRUDENCE.

1. *Particular Jurisprudence.* — I have thus far used "jurisprudence" as a term applicable to the decisions of the courts of a particular country, and have assumed that such an expression as "the jurisprudence of Italy" is correct. And notwithstanding Professor Holland's criticism,¹ I venture to think it desirable to have an expression for the science which teaches how the courts of a particular country ought to decide cases.

Indeed, there seems no objection to the usage which Professor Holland mentions as springing up in France of referring to the "jurisprudence" of a particular tribunal in the sense of "*La manière dont un tribunal juge habituellement telle ou telle question.*" Nor is it necessary that the courts in question should derive their authority from any territorial sovereign; "ecclesiastical jurisprudence" is a correct phrase, and we may appropriately speak of "masonic jurisprudence," or of the "jurisprudence of Knights of Pythias," if such organizations have courts with judicial functions.²

But although particular jurisprudence may thus be the jurisprudence of a non-political body, it commonly means the jurisprudence of a particular political community.

2. *Comparative Jurisprudence* is the systematic comparison of the rules upon which different tribunals ought to decide cases, for the purpose of discovering the elements of resemblance and difference.

There are two great bodies of law between which such comparison is profitable, — the Roman law, and the English common law. There are other systems which are derived from neither the Roman nor the English; for example, the Egyptian, the Jewish, the Greek, the Persian, the Chinese, the Patagonian. Of many of them we know little, and what we do know indicates that further knowledge will be valuable in explaining and illustrating former stages of law, rather than in aiding in its future development; for

¹ Jurisprudence (5th ed.), 2-5.

² Jurisprudence, it is true, is often used in a sense which it is impossible to defend. There are certain treatises or handbooks, many of considerable merit, containing those facts likely to arise in lawsuits with which the members of certain professions or trades are, or ought to be, familiar; such books are often called treatises on jurisprudence. Thus, works on "medical jurisprudence" are *vade-mecums* for lawyers and doctors, containing a mass of useful information on poisons, parturition, malingering, etc., but are without any scientific unity, or any pretension to be considered "law" at all. So in France they speak of "veterinary jurisprudence;" and there is no reason why, in like manner, we should not have "plumbers' jurisprudence" or "jockeys' jurisprudence."

in none of them has law ever grown beyond a relatively early state.

But though few fruitful fields for comparative analysis are likely to be found outside the limits of the common and Roman law, there are plenty of them within those limits. The European countries, except England, derive their law from the Roman, and all of the United States, except Louisiana, have systems based on the common law; yet in all these countries and States the law has developed in very varied forms, so that they furnish ample scope for the promotion of studies in comparative jurisprudence.

3. *General jurisprudence*: what does it mean, and what is its value, as distinguished from comparative jurisprudence? It may mean one of three things. *First*, those general principles which are necessary, because founded in immutable human nature. General jurisprudence, in this sense, is part of anthropology. I am certainly not going to deny that there are such principles; but if they exist, we know very few of them, and these very elementary, entirely insufficient with which to build the slightest legal structure. Treatises on general jurisprudence seldom get beyond the first chapter without introducing matter which is borrowed from one or more special systems, and which is obviously not *necessary*.

Second. It may mean the principles upon which all courts, apart from their special surroundings, ought to decide cases; that is, the way in which the legal rights and duties of men without Statutes, without precedents, without institutions, without a history, without clothes, without language, ought to be determined. Such speculations were at one time much in vogue. But this jurisprudence of "forked radishes" is now less esteemed.

Third. It may mean the principles upon which the courts of all countries do in fact decide cases. But whether the law of the Tongoes agrees with the common and civil law in requiring delivery to make a *donatio causa mortis* valid, and whether the chancellor of Dahomey regards conditions in constraint of marriage as *in terrorem* only, are matters upon which we have, I believe, no exact knowledge. The list of legal principles which are actually applied in all the nations and tribes of the earth will not probably be long; but the knowledge necessary definitely to form it, if it be deemed desirable to form it, can hardly be expected in this generation.¹

John C. Gray.

¹ See a sensible article by Mr. Buckland, "Difficulties of Abstract Jurisprudence," 6 Law Quart. Rev. 436.

DONATIO MORTIS CAUSA OF NEGOTIABLE PAPER.

IN *Rolls v. Pearce*,¹ Vice Chancellor Malins is reported to have said: "The Law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causa*; but the gift of a cheque is not valid unless it is presented for payment or paid before the death of the donor. . . . Now, I can really see no reason why, if a bill drawn on a goldsmith would be a good *donatio mortis causa*, a cheque should not be so too."²

These remarks of the learned Vice Chancellor are misleading. The fact that the law on questions of *donatio mortis causa* of negotiable instruments is at first sight confusing is due to want of discrimination by the courts. When closely scrutinized, it is believed that every case, save three, can be reconciled with a very simple principle, based, as it seems, on a general rule of law governing commercial paper, but never yet as to this class of cases fully enunciated, either by a court or text writer.

The proposition above quoted of the learned Vice Chancellor, that a bill of exchange may be the subject of a good *donatio mortis causa*, but that a check may not be, unless it is presented for payment and paid before the death of the donor, is not true. The remark, which has gained entrance into many opinions and text books, is no doubt a remnant of the old distinction that a check payable to bearer was not negotiable; for the learned judge immediately after says: "A distinction has, however, been drawn between the case of a bill of exchange and that of a cheque payable to bearer."³ Indeed, in the very case before him, the Vice Chancellor supported the gift of a check as a *donatio mortis causa*, which was not presented to the bank before the maker's death. And in *Clement v. Cheesman*,⁴ the gift of two checks of a third person, owned by the donor, was supported as a valid *donatio mortis causa*. On the other hand, it has been held that the promissory notes made

¹ L. R. 5 Ch. D. 730.

² L. R. 5 Ch. D. 733.

³ L. R. 5 Ch. D. 733.

⁴ L. R. 27 Ch. D. 631.

or the bills of exchange drawn by the donor himself are not such a species of property as is capable of a valid *donatio mortis causa*.¹

The grounds upon which the courts, that have refused to enforce against his estate the donor's own promissory note at the instance of the donee, have put their decisions, are that such a note is simply evidence of the donor's promise; that it is without consideration, and therefore cannot be enforced; and that on grounds of public policy such death bed gifts should be restrained, since by them all the safeguards of the Statutes of Frauds and Wills might be nullified; and with regard to bills of exchange drawn by the donor, it is said that until accepted, they are simply a promise to pay, if the drawee does not.

In these cases, as well as in the case of the donor giving his own check,² there is simply a contractual right against the donor's estate. It is not any part of his property that the donor gives to the donee, but simply an obligation against his estate. There is no possession given of any part of that estate, and therefore there is no delivery, which is an element that is considered essential by the consensus of authority. Moreover, the gift, being only of a *chose in action* against the estate, needs the aid of a court to give it effect; and the donee is met at the threshold of litigation against the donor's estate by the equitable plea of want of consideration. If, before the donor's death, the donee should indorse the note, bill or check to a purchaser for value without notice, there can be no doubt that the donor's estate would be liable on it, just as an indorsee for value can enforce against the maker a promissory note given for the accommodation of the payee, and the same would probably be true, if a bill or note were so indorsed after the donor's death. Moreover, if the donor indorse the obligation of a third person to the donee, his estate would be no more liable on such indorsement than it would be on his own bill or note, although the gift of such an obligation, even if it be a check, is a perfectly good *donatio mortis causa*.³ Both in law and by the true principle, therefore, governing gifts *mortis causa* of negotiable instruments, there is no distinction between the different kinds of negotiable paper, nor, in this regard at least, between such gifts and gifts *inter vivos*.

¹ *Parish v. Stone*, 14 Pick. 198; *Raymond v. Sellick*, 10 Conn. 480; *Tate v. Hilbert*, 2 Ves. Jr. 111; S. C. 4 Bro. C. C. 286; *Harris v. Clark*, 3 Comst. 93.

² *In re Mead*, L. R. 15 Ch. D. 651; *Second National Bank v. Williams*, 13 Mich. 282.

³ *Veal v. Veal*, 27 Beav. 303; *Clement v. Cheesman*, L. R. 27 Ch. D. 631.

The conclusion that the true principle governing these cases is that no obligation can be enforced against the estate of the donor, and thus, if his name is the only one on the paper, the instrument is worthless, is strengthened by the fact that it is now settled law that the donation of a bill or note or check of a third party is perfectly good, even without indorsement, and that the donee can reduce to possession his property, which he has thus acquired by manual transfer, in the name of the administrator or executor of the donor.¹ That the donee can enforce an obligation in the name of the legal owner is not, indeed, peculiar to this class of cases; for the real owner of a *chose in action* can always enforce it in the name of the nominal legal owner, as in the case where one discounts a note, and by mistake the vendor does not indorse it. But these cases conclusively show that the donee gets a perfect equitable title by delivery, and that indorsement is almost a useless formality in gifts *mortis causa* of negotiable paper, since an indorsement would give no rights against the indorser. In other words, these cases show that in this respect also *donatio mortis causa* does not differ at all from that of a gift *inter vivos*.

In short, the principle on which the cases in this branch of the law can be reconciled, seems to be that the donee can keep from the personal representative whatever assets he has, but he cannot diminish the assets that actually come into the hands of the executor or administrator. And this result is reached by applying the doctrine of want of consideration.

With regard to checks drawn by the donor there is of course a further reason for not allowing their validity against his estate, as a check is only an order on a banker, and is therefore revoked by the maker's death; and this is the ground upon which the courts have put these cases.

In those cases where the check is cashed or certified, a bill accepted or paid, or a note paid, before the donor's death, of course the gift is good; since then there is no question of suing the representative of the donor in order to obtain possession of a tangible gift, or of taking away any assets from the executor, because the donee has either the money or the obligation of a third person.²

¹ *Veal v. Veal*, 27 Beav. 303; *Duffield v. Elwes*, 1 Bligh, N. S. 497; *Bates v. Kemp-ton*, 7 Gray, 382.

² *Bouts v. Ellis*, 17 Beav. 121; affirmed 4 De G. M. & G. 249.

If, then, these anomalous death bed gifts are to have any validity at all, it would seem to be a sensible rule that one should be allowed to give away whatever is capable of manual delivery, but should not be allowed to charge his estate with obligations to the detriment of his heirs or legatees. It is perfectly possible that one may be willing to give a stated amount of money or property to another, but would never wish to authorize in any way *post mortem* litigation against his estate ; and checks, bills and notes given by way of *donatio mortis causa* are given probably always by laymen, in ignorance of their real effect.

There are, however, three cases which cannot be reconciled with this principle,¹ and which seemingly are not to be supported.

The first of these cases came at Trinity Term, 1718, before Sir Joseph Jekyll, Master of the Rolls. The nature of the cause is not disclosed by the report, which simply states that it came on upon the master's report. The facts were that a testator had on his death bed given his wife a purse and a bill on a goldsmith with which to buy her mourning. His Honor had no doubt that the purse, with its contents, was a good *donatio mortis causa* ; but as to the bill of exchange, he "at first held that the testator's ordering the goldsmith to pay £100 to his wife was but an authority, and determined by the testator's death."² He however reserved his decision until the Hilary Vacation, when he held the bill to be a good *donatio mortis causa* also, on the ground that, being given to the wife for mourning, it was like directions for a funeral, and should be given effect, if possible, since it operated as an appointment.

It seems, therefore, that the learned judge's inclinations got the better of his law.

In *Ward v. Turner*,³ Lord Hardwicke observes with regard to the bill of exchange in *Lawson v. Lawson*, that he "cannot say on what it depended. It is a kind of compound gift ; so many collateral circumstances are taken into it that nothing can be inferred from it ; but being a draft on his goldsmith, that draft was delivered ;" and Lord Loughborough, in *Tate v. Hilbert*,⁴ says that the fact was indorsed on the bill, that the amount of the bill was to be applied to the payment of mourning, and that the case was

¹ *Lawson v. Lawson*, 1 P. Wms. 441 ; *Bromley v. Brunton*, L. R. 6 Eq. 275 ; *Rolls v. Pearce*, L. R. 5 Ch. D. 730.

² *Lawson v. Lawson*, 1 P. Wms. 441, 442.

³ 2 Ves. 431, 441.

⁴ 2 Ves. Jr. 111, 121.

rightly decided, "as, taking the whole bill together, it is an appointment of the money in the banker's hands." The learned Lord Chancellor fails to suggest how the fact that the amount of the bill was to be used in payment for mourning weeds makes any legal difference. If, however, Lord Loughborough's distinction be sound, *Lawson v. Lawson* confessedly must be supported on the ground of appointment, and not on the doctrine of *donatio mortis causa*; and if the distinction be not sound, the case was overruled by Lord Loughborough himself in *Tate v. Hilbert*.¹

In *Bromley v. Brunton*,² a woman on her death bed gave her check upon her bankers for £200 to M. A. Bromley. The check was presented to the bankers twice before the maker's death, and payment refused because they doubted the authenticity of the donor's signature. On a bill for the administration of the trusts created by the will of the maker, Vice Chancellor Stuart allowed the amount of the check to the payee, on the ground that the gift was complete, saying: "I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through nonpayment to this time, occurred through the default of third parties."³ And he distinguishes *Tate v. Hilbert*, *supra* (erroneously called *Tate v. Leithead*), on the ground that there the check had not been presented. But it is obvious that the attempt to procure payment is by no means the same as payment; and a failure in such an attempt leaves the party in the same position in which he was before.

In *Rolls v. Pearce*,⁴ a man on his death bed drew two checks payable to his wife, who got them discounted by a banking firm before her husband died. They were presented to the drawees for payment after the maker's death, and payment was refused. The widow, having refunded what she had received on them, sought reimbursement from the executors. Vice Chancellor Malins supported her claim, on the ground that the gift was complete, and also on the sanction of a *dictum* by Lord Loughborough in *Tate v. Hilbert*,⁵ to the effect that if the donee in such a case receives the amount of the check in any way and from any source, he can keep it, — an observation which clearly

¹ 2 Ves. Jr. 111.

² L. R. 6 Eq. 275.

³ L. R. 6 Eq. 277.

⁴ L. R. 5 Ch. D. 730.

⁵ 2 Ves. Jr. 111, 118.

is not true. Obviously the last indorsee for value and without notice could have enforced the checks against the maker's estate, and the case can only be supported on the ground that the widow was such an indorsee, which would be impossible, and is wholly inconsistent with the reasoning of the opinion.

Of these two cases before the Vice Chancellors, it is sufficient to say that they are not consistent with the prior decision of Lord Romilly, Master of the Rolls, in *Hewitt v. Kaye*,¹ — which, being that of a superior tribunal, ought to have been binding upon the learned Vice Chancellors, — nor with the later cases of *In re Beak*² and *In re Mead*.³ *

Francis R. Jones.

¹ L. R. 6 Eq. 198.

² L. R. 13 Eq. 489.

³ L. R. 15 Ch. D. 651.

* *Bromley v. Brunton* was decided in 1868, *In re Beak* in 1872, and *Rolls v. Pearce* in 1877.

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THE DECISION OF *BRISTOL v. MIDLAND RAILWAY COMPANY*, AND THE TRUE NATURE OF A BAILOR'S INTEREST. — We are indebted to R. C. McMurtrie, Esq., for the following criticism on a note in the last issue of the REVIEW: —

"The criticism on *Bristol v. Midland* (1891), 2 Q. B. 653, seems to have overlooked the real ground of the decision. It is true it does seem to decide that trover will lie for a conversion before title accrued to the plaintiff. The criticism seems to assume that the decision is that one can sue for an injury that occurred before he became owner. This is apparently impossible; and the ground on which the case rests and is rested has, I think, been overlooked. It lies in the fact that the title of the owner had not been divested by the delivery or the so-called conversion; he might sue the person who delivered or the person who received the goods. The title remaining, notwithstanding the wrongful delivery, passed by the delivery of the bill of lading, and the bailee could not dispute the plaintiff's right or his duty to deliver when called on, or set up his wrongful conversion as destroying that title. I think this is the real ground, because in the case relied on, 2 Best & Sm. 1, *Wightman, J.*, admits that if the deeds had been *burned* before the title passed, the devisee could not sue. The wrongful delivery was evidence of conversion, but left the title unaffected, and did not convert that into a right to sue. Any subsequent owner could demand, and the refusal was evidence of a conversion at that time; and the bailee could not avoid that by showing he had already parted with the possession. This ruling is essential to justice; for the former holder, who might have sued for the wrongful delivery, having given up the bill of lading, had parted with the title, and had no interest that was impaired while he held it (he had been paid for his debt); while the holder of the title, who had paid for the property, could not sue for the act done before he bought, if that had put an end to the thing, so that nothing passed by the sale. But he could sue for not delivering property he was bound to keep and deliver to the holder of the bill of lading.

"The essence of the whole thing lies in the distinction between what is evidence of conversion, and a conversion that puts an end to ownership and converts that into a right of action."

The justice of this criticism must depend upon the true nature of a bailor's interest. All will agree that the bailor has not possession, but that he has a conditional right of possession, — that is, a right of action. In the opinion of our distinguished critic, the bailor has, so long as the chattel bailed is *in rerum natura*, something more than this right of action, — namely, the title. Here, with all deference, we must take issue. We are of Blackstone's opinion (2 Com. 453) that "the bailor hath nothing left in him but the right to a *chose in action*." We think any one who claims more than this for the bailor will have to exercise all his ingenuity to define the additional interest. We may refer for a fuller expression of our views to Vol. III. of the REVIEW, pages 314, 342, *n.* 1, 343-346.¹ An additional test of the accuracy of our position is furnished by the case of *Jones v. Hodgkins*, 61 Me. 480. The defendant was a bailee, with instructions to sell in behalf of the owner. The owner, without notice to the bailee, sold the goods himself to the plaintiff. The defendant subsequently, and without knowledge of this sale, sold the goods to another. The plaintiff sought to charge the defendant for a conversion. Three judges were in favor of the action, because by the sale of the bailor the title passed to the plaintiff, and the defendant, however innocent, had in fact sold the plaintiff's goods without any authority from him. The majority of the court were against the action. The reasoning is not altogether satisfactory; but the decision seems clearly right. The bailor's interest was simply a *chose in action* against the defendant. He had a right to have his goods back, unless they were sold before a countermand of the instruction to sell; and in that event he would be entitled to what the bailee had received for them. This right, and this right only, passed to the plaintiff. As the goods were sold before countermand, the plaintiff was not entitled to have the goods, and therefore could not maintain trover.

In *Bristol Bank v. Midland Company*, the bailee having converted the goods, the bailor had at the time of the sale to the plaintiff a choice of claims against the defendant. He might sue for the conversion, or he might demand his goods, and on refusal bring an action for the breach of the contract of bailment. This choice of rights passed by the sale to the plaintiff. The plaintiff made the demand and recovered. On principle and by the earlier decisions, the plaintiff should have enforced his rights in the name of the bailor. But in *Franklin v. Neate*, 13 M. & W. 481, the court, by judicial legislation, made it possible for the assignee of a bailor to sue in his own name.

JURISDICTION OF THE FEDERAL COURTS OVER QUESTIONS ARISING UNDER STATE LAWS. — The opinion of the Supreme Court in *Boyd v. Nebraska*, 12 Sup. Ct. Rep. 380, is a warning to the States that they may suddenly find that, through incautious legislation on their part, they have lost their freedom from vexatious Federal control. Ordinarily the choice of its governor is a matter which concerns the State alone. It may choose a non-resident Hottentot, if it desires, and the Federal Government cares not a whit. The Constitution of the United States is a constitution for the United States, and not for each State, except in certain limited particulars. Consequently, it does not prescribe rules for the

¹ Page 344, line 3, "valid" should be "invalid," and page 346, line 2, "vendee," should read "vendor."

management of their internal affairs by the States. Nevertheless, the highest Federal court has just passed upon the qualifications of an aspirant for the office of governor of Nebraska.

The case arose upon a provision in the State constitution to the effect that the governor should be a citizen of the United States. The respondent claimed to be a naturalized citizen of the United States, and to have been duly elected governor. The Supreme Court of the State decided against him,¹ on the ground that he had never become a citizen. Upon writ of error the Supreme Court of the United States decided for the respondent, reversing the decision of the State court. Its jurisdiction is founded upon the fact that here was a decision of a State court adverse to a right claimed under the laws of the United States.

It may be doubted whether the court has not assumed a jurisdiction which Congress did not give it, and, indeed, could not give it. The right to be governor of a State is not a privilege of a citizen of the United States as such, and is essentially outside the sphere of Federal concern. Nor is it made a Federal question by a State law requiring that the governor shall be a citizen of the United States. The phrase "citizen of the United States," as used in the State constitution, is merely a mode of expression. The State might have imposed the same qualifications in other terms, and confessedly there would have been no question for the Federal courts. Surely Federal jurisdiction depends upon substance rather than form, and cannot be made to hang upon the phrase which the legislature uses. Suppose a State imposes a penalty for selling liquor without a license from the United States, and the State court has found that the defendant had no such license. Is he entitled to have his case reviewed by the Federal courts? When a State adopts a Federal law, or when it legislates in terms of Federal rights or privileges or status, it there makes the law its own. The law is none the less a State law because it is expressed in terms of Federal law. It is submitted that the decision of the court would have been sounder if it had been to the effect that where a question arises under a United States law which comes into the case only because brought in by a State law founded upon it, there the question does not involve the laws of the United States. Mr. Justice Field dissents, upon the ground set forth above, and points out that *Missouri v. Andriano*, 138 U. S. 496, the only authority which the majority cite, contained only a *dictum* on this subject.

EXTENT OF LEGISLATIVE POWER UNDER THE DOCTRINE OF THE GRANGER CASES.—The Supreme Court of the United States has again affirmed the doctrine of the Granger cases. The actual decision² is that a law of New York prescribing a maximum rate of charges for grain elevators in the city of Buffalo is valid. The case is, indeed, almost an exact repetition of *Munn v. Illinois*,³ and, as in that case, there is a strong dissent denying the general right of the Legislature to regulate a purely private business, though "clothed with a public interest."

There is only one respect in which the case really adds anything to what has gone before, and that is the interpretation which Mr. Justice Blatchford, writing the opinion of the court, puts upon the decision of

¹ 48 N. W. Rep. 739.

² *Budd v. State of New York*, 12 Sup. Ct. Rep. 648.

³ 94 U. S. 113.

the case of *Chicago etc. R. R. Co. v. Minnesota*, 134 U. S. 418. He says, speaking of that case: "That was a very different case from the one under the Statute of New York in question here; for in this instance the rate of charges is fixed directly by the Legislature. . . . What was said in the opinion in 134 U. S. as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the Legislature." It is evident from this language that the learned Justice considers that the case of *Chicago, etc. R. R. Co. v. Minnesota* decided merely that the Legislature could not authorize a commission to settle finally maximum rates for railroad charges which should not be examinable in the courts on the point of reasonableness, and that it did not decide that the Legislature itself had not the power so to establish rates. With all due deference, it is difficult to see how this explanation is arrived at. There was certainly in that case an attempt by the Legislature—at least that was the interpretation put upon the Statute by the State court, and adopted by the Supreme Court—to clothe the commission with absolute power finally and conclusively to establish railroad rates. If the Legislature itself possessed such power, and *could* delegate it to a commission, it seems difficult to say that it did not do so. And as there was no intimation in the decision of the case that anything turned on the power to delegate,—which seemed to have been admitted,—the conclusion seems irresistible that the court must have held that the Legislature did not itself have this final power over rates which it could delegate. And this, without question, was what the minority of the court thought the decision to be. This point, however, the court in the present case intimates to be still open; for the opinion says: "In the cases before us the records do not show that the charges fixed by the Statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws, *even if under any circumstances we could determine that the maximum rate fixed by the Legislature was unreasonable.*"

Judge Blatchford also adverts to the fact that in the *Minnesota* case the Act of the Legislature was passed under a constitution "which provided that all corporations, being common carriers, shall be bound to carry on 'equal and reasonable terms.'" It would seem that this circumstance was immaterial. In the absence of such constitutional provision, it is conceded that the Legislature has power to regulate railroad charges, under its general police power. Now, all regulations made in the exercise of this legislative power are subject to the restriction that they be reasonable and proper for the purpose in view. Courts have frequently pronounced such laws invalid upon the sole ground that they were unreasonable.¹ And there would seem to be no reason why a law establishing railroad rates should not be subject to the same test as any other police regulation. Indeed, there can hardly be any branch of legislation which requires such close scrutiny from the courts on the score of reasonableness. Of course it is not meant by this that the court is to determine upon the validity of such a law according to its own notion of what is reasonable. It was determined by the *Granger* cases that it is primarily for the Legislature to say what rates shall be reasonable, and the court has no right nor power to substitute its own opinion for

¹ See *Toledo Co. v. Jacksonville*, 66 Ill. 37; *Ohio Co. v. Lackey*, 78 Ill. 55.

that of the Legislature. But the court has the right and duty here, as in all other cases of police regulations, to examine the determination of the Legislature, and to declare it invalid if it goes beyond the limits of rationality. When it was held that the Legislature had the power to establish reasonable rates for railroad charges, it did not follow that it had power to fix any rate it pleased, reasonable or beyond the bounds of reason. And the question whether or not the Legislature had exceeded its power still remained for the court. It was supposed heretofore that the Minnesota case had established this very point. But the *dictum* in *Budd v. State of New York*, quoted above, at least throws doubt upon the subject.

RECENT CASES.

AGENCY — NEGLIGENCE OF VICE-PRINCIPAL. — A foreman in charge of laborers removing the roof of a railroad company's building is the vice-principal of the company, and not a fellow-servant of the laborers. *Sullivan v. Hannibal & St. J. Ry. Co.*, 17 S. W. Rep. 748 (Mo.).

BILLS AND NOTES — CO-MAKER AS SURETY — RATIFICATION OF MATERIAL ALTERATION. — Defendant, as surety for one T., signed a note as co-maker, payable to plaintiff. Afterwards, without the knowledge of defendant, one M. signed the note as an additional surety. Defendant heard subsequently of this alteration in the note, and assented to it, but received no new consideration for his assent. *Held*, in an action on the note, that this assent was a valid ratification, and bound him. *Owens v. Tague et al.*, 29 N. E. Rep. 784 (Ind.).

There is very little authority on this point. In favor of the principal case are 13 Iowa 567 and 21 Ill. 128 (*semble*); cf. also Brandt on Suretyship, § 384. But it is hard to see how the court reconcile this case with their previous language in *Henry v. Heeb*, 114 Ind. 275, where it was said that a forged signature on a note purporting to bind one H. as surety, could not be effectually ratified without a new consideration; cf. Daniels on Negot. Inst., §§ 1351, 1352 a. And on principle the case cannot be supported. The alteration in the note by adding a new party, being material, was a real and not a personal defence; it made the note void. In default of an implied agency, or of an estoppel, none of the original parties could revive his liability without a new valid contract.

BILLS AND NOTES — FAILURE OF CONSIDERATION NOTICE. — Defence of breach of warranty is of no avail against indorsee for value of a negotiable note, before due, who knew that the consideration for which the note was given was a jack, warranted to be a sure foal-getter, but having no knowledge until after transfer that the warranty failed. *Rublee v. Davis*, 51 N. W. Rep. 135 (Neb.).

BILLS AND NOTES — STATUTE OF LIMITATIONS. — S. made a note payable on demand to K., or order, dated Oct. 9, 1879. K. indorsed the note to the N. Bank as collateral security, and later it was indorsed to the plaintiff with K.'s consent as collateral for a debt due by K. to the plaintiff. S., the maker, not knowing of the transfer of the note by K., paid the note to K. by instalments, beginning in 1885 and ending in 1889. Plaintiff notified S. that he was the holder of the note, and S. pleaded the Statute of Limitations. The plaintiff relied on a payment in November, 1885, which K. had turned over to him, to defeat the plea. *Held*, an acknowledgment to a third party is not sufficient to take a debt out of the Statute. Here, as the defendant did not suppose that K. was the plaintiff's agent to receive this payment (as in fact he was not), the payment to K. was not an acknowledgment which would take the case out of the Statute. *The Stamford, S., and B. Banking Co., Ltd., v. Smith*, 92 L. T. 273 [Ct. of App. (Eng.)]

This decision seems to be inconsistent with the general English rule on the subject as laid down in Byles on Bills (14th ed.), p. 372. The learned author there refers to several cases in which an acknowledgment, or part payment of the debt by the obligor

to some party to the paper other than the holder, has been held to take the bill or note out of the Statute. In *Clark v. Hooper*, 10 Bing. 480, Chief Justice Tindal said that the effect of part payment to third persons (by reason of obligor's mistake as to who was his creditor), was as much an acknowledgment of the debt as if the debtor had written a letter saying that he would pay any one who could prove himself the rightful payee.

CIVIL SERVICE EXAMINATIONS — PROFESSIONAL EXPERTS. — The board of visiting physicians of a hospital are professional experts, and not employees, and are not, therefore, within the scope of a law requiring the latter to submit to competitive examination prior to appointment. *Commonwealth v. Fetter*, 23 Atl. Rep. 568 (Pa.).

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — COVENANT PREJUDICIAL TO CHINESE. — A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the Government, in contravention of its treaty with China, and in violation of the Fourteenth Amendment of the Constitution, and is not enforceable in equity. *Gandolfo v. Hartman*, 49 Fed. Rep. 181 (Cal.).

That such a contract is contrary to the principles of the Constitution and to sound public policy, and that it should not be enforced by a court of equity, may be admitted. But while recognizing the correctness of the decision, we cannot accede to the reasoning of the learned judge. He considers this a violation of the Fourteenth Amendment, and says: "Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other." We cannot agree that the Fourteenth Amendment was aimed at individuals. See *Civil Rights Cases*, 109 U. S. 3. Nor do we see how the treaty with China helps the case. The true reason for the decision, and the one that undoubtedly weighed with the court, is that the contract is so opposed to public policy that equity should refuse specific performance.

CONSTITUTIONAL LAW — REPEAL BY SUBSEQUENT STATUTE. — Defendant was convicted of murder in the first degree, and sentenced in 1888. In 1891 a law was passed providing that executions should take place in the State's prison. *Held*, that the statute was *ex post facto* with regard to defendant, as applying a higher degree of punishment, and that as the law was intended to apply to all cases of murder, past as well as future, it was wholly unconstitutional and void, and the old law was still in force. *People v. McNulty*, 28 Pac. Rep. 816 (Cal.).

This case is the first one to hold that the old law was not repealed under such circumstances. The result reached is desirable, but it may be doubted how far the case will be followed.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — MUNICIPAL TAX ON TUG-BOATS. — A city ordinance of Chicago prohibits the employment of tug-boats in the river and harbor except when licensed by the city. *Held*, that this ordinance is not invalid, although the tug-boats are also licensed by the United States for the coasting trade, and although they are engaged in towing vessels themselves engaged in interstate commerce. The court say that the tugs are mainly used on the river, within the corporate limits of Chicago; that the navigation of the river has been improved by the city at its own expense; and that the license fee should be considered in the light of a toll for the use of the river in its improved condition. *Harmon v. City of Chicago*, 29 N. E. Rep. 732 (Ill.).

CONSTITUTIONAL LAW — POLICE POWER — MONOPOLIES. — A city ordinance gave the plaintiff the exclusive right to remove from the city all such dead animals as should not be removed by the owner in person, or by his immediate servant, within twelve hours after the death thereof. *Held*, a valid exercise of the police power, and the defendant will be restrained from removing any such animals. *Nat. Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458 (Cal.).

CONSTITUTIONAL LAW — UNITED STATES SUPREME COURT FOLLOWING STATE DECISIONS — TERRITORY BECOMING A STATE. — When pending an appeal from a Territorial court to the United States Supreme Court upon a question of local law, the Territory is admitted as a State, and the State Supreme Court thereof, in another case, reaches an opposite conclusion upon the same question, the latter decision will be followed by the Supreme Court of the United States. *Stutsman County, Dak. v. Wallace*, 12 Sup. Ct. Rep. 227.

CORPORATIONS — CITIZENSHIP OF. — A corporation chartered by the State of Missouri was afterwards chartered by Arkansas. *Held*, the corporation may still be considered as a citizen of Missouri, and when sued by a citizen of Arkansas in the State

courts may have the suit removed to the Federal courts. *Stephens v. St. Louis & S. F. R. Co.*, 47 Fed. Rep. 530 (Ark.).

CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.—Certain stenographers, being only a small proportion of those engaged in the business in Chicago, formed an association to promote uniform rates. The members were allowed to cut prices against outsiders, but not among themselves. *Held*, in an action by one member against another for underbidding him, that the agreement was in restraint of trade and void. *More v. Bennett*, 29 N. E. Rep. 889 (Ill.).

The court distinguishes an agreement by the vendor of the good-will of a business not to interfere with his vendee by competition, which is enforceable as being in partial restraint of trade only, from all contracts, like the one above, which tend to stifle competition in general, no matter how limited their actual scope.

CORPORATIONS—BANKS—LIABILITY OF DIRECTORS.—The director of a bank whose services are gratuitous and whose duty it is to pass upon the transactions of the bank, does not owe to the creditors of the bank such care as a reasonable man exercises in the conduct of his own business, but is amenable only for fraud or for such negligence as amounts to fraud. *Sweutzel v. Penn. Bank*, 23 Atl. Rep. 405 (Pa.).

CORPORATIONS—CONSOLIDATION—FOREIGN AND DOMESTIC CORPORATIONS—ORGANIZATION TAX.—Laws 1869, c. 917, provide for the consolidation of corporations. Laws 1886, c. 431, require the payment of an organization tax from corporations incorporated under the laws of New York. The appellant was composed of domestic and foreign corporations consolidated under the first-mentioned laws. *Held*, that this was not a new incorporation under the laws of New York which would require the payment of the organization tax. *People v. New York C. & St. L. R. Co.*, 29 N. E. Rep. 959 (N. Y.).

While agreeing that the consolidation of domestic corporations under laws of 1869 would be a new incorporation, the court relied on the fact that here the consolidation was by foreign and domestic corporations. To effect the consolidation, the New York Statute alone would not be sufficient; it could be done only by the consent of all the States which had chartered the corporations proposing to consolidate. The new corporation then, arising from the consolidation, would not have been "incorporated by or under any general or special law of this State," within laws of 1886, c. 147.

CRIMINAL LAW—ATTEMPT TO COMMIT FELONY.—In a prosecution for an attempt to commit larceny, it appeared that the prisoners had put their hands into the pockets of certain persons, but there was no evidence that said persons had any property which the prisoners could have stolen. *Held*, it is not necessary, in an indictment for an attempt to commit a felony, to prove that the attempt would have succeeded if the attempt had not been frustrated; *i. e.*, to prove that larceny was possible here. *Reg. v. Ring*, 92 L. T. 296 [Cr. Cas. Res. (Eng.)].

This case overrules the former English doctrine as laid down in *Reg. v. Collins*, 9 Cox C. C. 497. The rule in *Reg. v. Ring* is that laid down in the Massachusetts case of *Com. v. McDonald*, 5 Cush. 365.

ELECTRICITY—PRODUCTION OF, A MANUFACTURE.—A company engaged in producing electricity and supplying the same to its customers for lighting purposes is exempt from taxation under a New York statute which applies to "manufacturing corporations." *People ex rel. Brush Electric Illuminating Co. v. Wemple, Comptroller*, 29 N. E. Rep. 1002 (N. Y.).

See a dictum in accord in 22 Atl. Rep. 840, where the decision, turning on the construction of special Pennsylvania Statutes, went the other way. The same general line of argument might eventually lead the courts to say that tapping an electric wire was common law larceny.

EMINENT DOMAIN—DAMAGES.—Where a railroad company, having the power of eminent domain, enters upon land without the consent of the landowner, and without complying with the law regulating the exercise of such power, and constructs a railroad track thereon, *held*, that the value of the improvements thus put by the company on the land cannot be included in estimating the damage sustained by the landowner, in proceedings subsequently instituted under such law by the company in its legal successor, having similar power, to condemn the land, or an easement therein, to the company's use; and this, whether the company has been ousted from the former possession or not. *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. Rep. 465 (Fla.).

The principle of this case, which is one of first impression in Florida, is affirmed in Mississippi, Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, and Alabama. The few cases which hold the contrary proceed upon a strict application of the rule of the common law, established when railroads were unknown, that

structures placed upon land by trespassers become part of the realty and cannot be removed.

EQUITY — INJUNCTION — ENTICEMENT FROM SERVICE. — An employer is not entitled to an injunction to restrain striking workmen from inducing others to leave his employ, as long as the strikers use no intimidation, and are actuated, not by malice, but by a desire of getting higher wages; nor will the court enjoin the publication of newspaper articles encouraging and approving the ends and methods of the strikers. *Rogers v. Evarts*, 17 N. Y. Supp. 264 (Supr. Ct.).

Lumley v. Gye, 2 El. & Bl. 216, decided that one who knowingly induces a person to break a contract of service is liable to the other party to the contract. The court says that such a doctrine is out of keeping with modern civilization, and that it is a matter of grave doubt whether it would be followed in New York.

EQUITY — INJUNCTION — POLLUTION OF STREAM. — A riparian owner is entitled to an injunction against the daily befouling and discoloration of a stream by the discharge of dyes from a plush factory, although such discharge is necessary to the convenient and successful use of the factory, and causes no actual damage. *Townsend v. Bell*, 17 N. Y. Supp. 210 (Supr. Ct.).

The pouring of foreign matter into the stream is distinguished by the court from the abstraction of water from it, and is held actionable, like a trespass, without actual damage.

EVIDENCE — PAROL — CONTRACT IN WRITING. — A certificate of deposit issued by a bank made no mention of interest; but there was an oral promise to pay interest, and the cashier made a memorandum of the agreement. *Held*, this may be read with the certificate as evidence of the entire contract. *Thomas v. Beal*, 48 Fed. Rep. 614 (Mass.).

This seems at variance with the rule that parol evidence cannot be introduced to vary the terms of a written contract. The certificate itself being the contract, anything extrinsic would seem to come within the rule.

EVIDENCE — VIEW OF PREMISES. — In an action for negligence, the court sent the jury to view the premises. *Held*, the instruction "that the only purpose of this examination is to aid you in determining the issue with the other evidence in the case," was erroneous. The jury should not use their own observation as evidence even if it convince them of a fact which the testimony fails to prove. *Morrison v. Burlington C. R. & N. Ry. Co.*, 51 N. W. Rep. 75 (Iowa).

Topeka v. Martineau, 42 Kans. 387, expresses the better opinion, to the effect that the knowledge acquired by the jury at the view is to be used like any other evidence in the case.

HUSBAND AND WIFE — NATURE OF ALIMONY — RIGHTS OF FORMER CREDITOR OF WIFE. — The right against a husband to alimony, granted by the court to a divorced wife, cannot be attached by a creditor for a debt contracted by the wife before the decree of alimony was issued. *Romaine v. Chauncey*, 29 N. E. Rep. 827 (N. Y.).

This point seems not to be covered by any authority. It is decided on the ground that a wife's right against her husband for maintenance and support cannot be attached while the marriage relation lasts, and that alimony is, in theory, a continuance of the same right.

MUNICIPAL CORPORATIONS — COUNTY BONDS — ESTOPPEL BY RECITALS. — Bonds were issued reciting that the Act under which they had been issued had been fully complied with, that the issue was authorized by a majority vote, and that the whole amount of the issue did not exceed the limit of indebtedness prescribed by the constitution. *Held*, that, as against a *bona fide* holder, the county was estopped by the recitals from questioning the validity of the bonds, on the ground that the percentage of indebtedness allowed by the Constitution was exceeded. *Dixon Co. v. Field*, 111 U. S. 83, and *Lake Co. v. Graham*, 130 U. S. 674, distinguished on the ground that in those cases enough appeared in the bonds to put a purchaser on inquiry, when he would have found that the constitutional limit of indebtedness had been exceeded, while here nothing of the kind appeared in the bonds. (Gray, J., dissented.) *Board of County Com'rs of Chaffee Co. v. Potter*, 12 Sup. Ct. Rep. 216.

See on the same question, though there the purchasers had actual knowledge, *Dist. Township of Doon, Lyon Co. (La.) v. Cummins*, 12 Sup. Ct. Rep. 220.

The above decisions carry the doctrine of estoppel by recitals in county bonds somewhat farther than any prior decisions have done. It seems to be going rather far to estop the county from setting up the fact that the constitutional limit of indebtedness has been passed, even though the purchaser has been necessarily deceived by the recitals; yet that is the doctrine which now has the approval of the Supreme Court.

NEGLIGENCE — LICENSE — DANGEROUS PREMISES. — The fact that a private way

opening on a public street is paved, and to all appearances a public street, is not an invitation to the public to enter. Defendant, the owner of the way, is not liable to strangers entering thereon without permission. *Nichols v. Stevens*, 29 N. E. Rep. 1150 (Mass.).

The doctrine of implied license has been carried to its extreme in Massachusetts. This case seems to mark a halt. The court attempts to distinguish *Holmes v. Drew*, 25 N. E. Rep. 22 (Mass.).

PERSONAL PROPERTY — RIGHTS OF FINDER — LOSS OF LIEN BY JUDGMENT. — When the owner of lost property offers a reward for its discovery and return, *held*, that the finder is entitled to possession of the property as security for payment of the reward, and that this lien is not lost because the finder has recovered a judgment, as yet unsatisfied, for the amount of the reward. *Seemle*, that the same rule holds in regard to a pledgee's lien. *Everman v. Hyman*, 29 N. E. Rep. 1140 (Ind.).

The first point illustrates the spread of a growing, but far from universal, doctrine. Massachusetts, Pennsylvania, and three other States agree. On the second point the courts follow the trend of what little recent authority there is. But see Story on Bailment (7th ed.), § 361, *contra*.

REAL PROPERTY — SERVITUDES — USE OF ELECTRICITY AS A MOTIVE POWER. — The use of electricity for propelling street cars does not impose upon the streets a new servitude so as to entitle abutting owners to additional compensation, and the grant of such privilege is fully within the powers of the city council. *Koch v. North Avenue Ry. Co.*, 23 Atl. Rep. 463 (Md.).

This case is one of first impression, bringing Maryland in line with the recent decisions in a number of other States.

REAL PROPERTY — DEFECTIVE TITLE — PARTY-WALLS. — A contract of sale of a city lot stated that the northerly wall of the building on the lot was a party-wall, but said nothing about the southerly wall, which was also a party-wall. There was an agreement to give title free from incumbrances. *Held*, the purchaser was warranted in rejecting the title, because the silence of the contract about the southerly wall amounted to a representation that it was not a party-wall. *O'Neill v. Van Tassell*, 17 N. Y. Supp. 824 (Supr. Ct.).

The court distinguishes the case of *Hendricks v. Stark*, 37 N. Y. 106, where it was held that a purchaser who signed a contract of sale which said nothing about party-walls could not reject the title for the reason that the walls were party-walls, party-walls with their reciprocal easements being a benefit rather than a burden.

REAL PROPERTY — ELEVATED RAILROADS — NATURE OF QUASI-EASEMENTS TO ACCESS, LIGHT, AND AIR. — Where the operation of defendant's railroad has on the whole not lessened the value of plaintiff's land, plaintiff has no action for the disturbance of his right to light, air, and access from the street considered separately. *Bohm et al. v. Metropolitan Elevated R. R. Co.*, 29 N. E. Rep. 802 (N. Y.).

This case seems to show where the New York court mean to stop, and also illustrates the difference between real easements and the so-called quasi-easements, the former of which are, while the latter are not, absolute rights. It is obvious that if A has a right of way over B's premises, and B obstructs that right of way, it is no answer to A's action that B's obstruction has otherwise benefited A's land. With the quasi-easements, as in the principal case, it is otherwise.

RELEASE OF POWER OF APPOINTMENT — RIGHT OF CESTUI TO A CONVEYANCE OF TRUST PROPERTY. — A father, who was tenant for life under his marriage settlement, had power to appoint among his children the interest in remainder, and in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage, three sons, and then the wife died. One of the sons died an infant; the other two attained twenty-one; but one of them died a bachelor and intestate. The father took out administration to the last-mentioned son, and executed a deed releasing his power of appointment, and then took out a summons calling on the trustee to transfer one moiety of the personal trust-estate to him. *Held*, (1) that the release of the power was valid, and that the father was entitled to the son's reversionary interest as his administrator; (2) that inasmuch as the father's life interest and the son's reversion were held by the father in different rights, there was no merger, and that so long as the father's life interest subsisted, to give him the legal estate would be merely a substitution of trustees, which the court would not decree; but (3) that on the father's executing a surrender of his life interest, he was entitled to have a moiety of the fund transferred to him. Decree that on the plaintiff's undertaking to surrender his life interest in one moiety of the personal estate, the trustee should convey to him. *In re Radcliffe-Radcliffe v. Burns* [1892], 1 Ch. 227.

Smith v. Houblon, 26 Beav. 482, followed; *Cunynghame v. Thurlow*, 1 Russ. & My. 436, *n.*, not followed.

SALE OF CHATELAINS — PORTION OF A MASS. — Where a certain number of barrels are sold out of a greater number of exactly the same kind and quality, with intention that title should presently pass, and where the vendee has absolute right at any time to take the number contracted for out of the whole, title passes to the vendee, though the specific articles are not actually designated or separated from the rest. *Mackellar v. Pillsbury*, 51 N. W. Rep. 222 (Minn.).

STATUTE OF LIMITATIONS — FRAUD AS A BAR. — The Statute of Limitations does not begin to run while plaintiff's cause of action is concealed from him by the fraud of the defendant. *Reynolds v. Hennessy*, 23 Atl. Rep. 639 (R. I.).

This doctrine, though generally enforced in equity, is not usually enforced at law.

SOLICITOR'S LIEN — PARTITION ACTION. — Where in a partition action the plaintiff has changed his solicitor, the old solicitor may be ordered to deliver up papers, come to his hands for the purposes of the action, to the new solicitor, to be held by the latter subject to the lien of the former, and to be returned when the judge shall direct. This is because, although the plaintiff and the defendant are apparently the only parties interested, there may be third parties interested as incumbancers, so that the same reason exists for such an order as in an administration action. *Boden v. Hensby* [1892], 1 Ch. 101 (Eng.).

TELEGRAPH COMPANIES — NON-DELIVERY OF MESSAGES — MEASURE OF DAMAGES. — Plaintiff, anticipating a heavy decline in the market price of certain corporate stock, and desiring to speculate in the same by selling on the exchange before the decline began, and thereafter purchasing at a lower figure, delivered to defendant company the following message, addressed to his brokers: "Sell 200 Tennessee Coal and Iron." The message was negligently delayed, and not delivered until eight days later, during which time the stock had dropped from \$73 to \$55 per share. Plaintiff, in fact, had no stock to sell, but kept with his brokers securities, on the strength of which they would have sold the stock on exchange, and bought again on plaintiff's order. *Held*, in an action against the telegraph company to recover the difference in price between the stock at the time the message should have been delivered, and the time it actually was delivered, that the damages were too remote, uncertain, and speculative, and there could be no recovery therefor. *Cahn v. Western Union Tel. Co.*, 48 Fed. Rep. 810 (Miss.).

This decision seems contrary to the weight of authority, since the face of the despatch was such as to disclose the nature of the business and the importance of promptitude in transmission and delivery. See 55 Penn. St. R. 262; 13 Cal. 422; 98 Mass. 232; 60 Me. 9; 44 N. Y. 263; 37 Ia. 214; 68 Ga. 299; Thompson on Electricity, § 335 *et seq.*; Scott and Yarnagin, § 389 *et seq.*; Gray on Communication by Telegraph, §§ 85, 86. *W. U. Tel. Co. v. Hall*, 124 U. S. 444, is cited as authority for the position taken by the court in Cahn's case; but in *W. U. Tel. Co. v. Hall* it was not disclosed in the record whether, between the time the telegram should have been delivered and the time of bringing the action, the price of oil had advanced or receded from the price at the date of the intended purchase.

TORT — NEGLIGENCE — REPRESENTATIONS. — The plaintiffs owned a steam vessel which was unloading in a dock which was part of a harbor belonging to the defendants. The propeller of the plaintiffs' vessel became befouled so that it was necessary to dry-dock the vessel. The defendants' harbor-master represented to the captain that he could safely beach his ship in a lock connecting with the dock where she was unloading. The captain, relying upon this representation, did beach his ship there, and she was seriously injured in consequence of an inequality in the bottom of which the harbor-master knew, or ought to have known. Apparently the defendants were to receive no extra compensation for this use of the lock. The lock had been but rarely used for such a purpose. *Held*, that the harbor-master's representation amounted to something more than a mere license, and that he had been guilty of negligence for which the defendants were liable. *Little v. Port Talbot Co.* [1891], A. C. 499 (Eng.).

TORT — NUISANCE. — The plaintiffs moved for an injunction to restrain the defendant company from so using its machinery as, by vibration, noise, etc., to injure the plaintiffs' property. The defendant had used the boundary wall between its premises and those of the plaintiff as part of the wall of their engine-house. This wall was within twenty feet of the plaintiffs' building. An engineer reported that by removing the power house a short distance the nuisance would be diminished, but that the proposed site would be less convenient. The defendant was empowered to work its road by electricity. The court found that a serious nuisance was caused to the plaintiffs.

Held, the defendant was to choose a site, and having chosen this as the most convenient, could not be compelled to remove. *Allison v. C. & S. L. Ry. Co.*, 92 L. T. 313 (Eng. Ch. Div.)

The decision seems unsound, inasmuch as the site chosen for the exercise of a trade is a *convenient* one only when it is carried on where no injury results to others from it. *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642; *Bamford v. Turnley*, 3 B. & S. 62 (overruling *Hole v. Barlow*, 4 C. B. N. S. 334). In prosecutions or actions for nuisances, the courts will not balance conveniences; but when the right and its violation are clear, there can be no excuse urged that would protect the person or corporation that causes the injury from all the consequences, civil or criminal. *The Attorney-General v. Leeds*, 39 L. J. 354; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 167; *Pinckney v. Ewens*, 3 L. T. N. S. 741.

TRUSTS—PROCEEDS FROM COLLECTION OF DRAFT.—A bank received a draft for collection, with directions to remit the proceeds to a third bank. Collection was made, but proceeds were not remitted. After a few days a receiver was appointed for collecting bank. *Held*, he cannot be charged as trustee. *Merchants' & Farmers' Bank v. Austin*, 48 Fed. Rep. 25 (Ala.)

TRUST—STATUTE OF LIMITATIONS.—A debt secured by a deed of trust is barred by the Statute of Limitations. *Held*, that if trustee refuses to exercise his power of sale, court would not appoint a substitute trustee, as that would amount to enforcing a barred debt. *Fuller v. Oneal*, 18 S. W. Rep. 479 (Texas).

The decision seems unsound, as it would allow the trustee to keep the property, since the debtor could not compel a reconveyance, the debt not having been paid. In case of a debt secured by a trust, there is no limitation as regards time to the lien of the debt short of a presumption of payment from lapse of time. Angell on Limitations, § 468; 8 Watt, 504.

A CORRECTION.

PARTNERSHIP—RIGHTS OF RETIRING PARTNERS.—In commenting on the case of *Williams v. Farrand*, 50 N. W. Rep. 446 (Mich.), which related to the rights of retiring partners, we were in error in supposing that the case was opposed to the present English law. It is opposed to the doctrine of *Labouchere v. Dawson*, L. R. 13 Eq. 322, but that case had been practically overruled by *Pearson v. Pearson*, 27 Ch. Div. 145, and *Vernon v. Hallam*, 34 Ch. D. 748. And see Lindley on Partnership, p. 440. It may be added that the doctrine of *Labouchere v. Dawson* has much to recommend it, and it was overthrown by only a majority of the court.

REVIEW.

A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS, by Montgomery H. Throop. New York: The J. T. Johnson Co., 1892. pp. clxxix and 963.

This book cannot but prove of great value to the practising lawyer. "It aims to collect, arrange in a logical and convenient form, apply, and comment upon the general rules of law relating to all public officers, from the highest to the lowest, and sureties in their official bonds, as found in the adjudications of the courts in England and in this country." It has accomplished its avowed purpose. It contains a thorough and careful treatment of the subject, dealing rather with general principles than with local law, and has an exhaustive collection of cases. A book such as this, which brings into a comparatively small compass and arranges in a convenient form all the authorities on a certain branch of the law, is a most valuable aid to the lawyer.

Its usefulness is increased by a most admirable arrangement. In addition to the Table of Contents, Index, and Table of Cases, it contains a carefully prepared Analysis, which will materially help the reader.

The work of the publishers is admirably done. The book will be found to be an attractive as well as a useful addition to the lawyer's library.

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RECENT STATE CONSTITUTIONS.

TO the American statesman and jurist there is no more important subject than the manner in which we make and change our organic law, our constitutions. We have abundant material for such a study; for although but little more than a century of our national history has run, we have already held two hundred constitutional conventions. There has thus gradually grown up in the United States a new branch of law, — one which, perhaps yet in its infancy, is still developing and growing.

We propose to examine now the four latest instances of constitution-making. Two of these new constitutions are framed by old States, *i. e.*, Mississippi and Kentucky, and two belong to the last States admitted to the Union, *i. e.*, Wyoming and Idaho.

Wyoming was organized as a Territory in 1869, and its tenth Legislative Assembly, which convened in 1888, memorialized Congress for the passage of an enabling Act, that it might become a State. Favorable reports on such an Act were made in both Houses of the Fiftieth Congress, but Congress adjourned without taking action thereon. Assuming that the next Congress would sanction their course, boards of county commissioners of a large majority of the counties passed resolutions requesting the Territorial officers to divide the Territory into districts, to apportion the number of delegates each district should be entitled to, and to issue a call for the voters therein to elect delegates to a convention to

frame a constitution which should be submitted to popular vote, —all according to the manner provided in the bill then pending before the United States Senate.

Pursuant to these requests, the Governor, Chief-Justice, and Secretary of the Territory met at the capitol, June 3, 1889, divided the Territory into suitable districts for the election of delegates, and apportioned the number of delegates for each district; and the Governor of the Territory issued a proclamation directing that an election be held throughout the Territory on the second Monday in July, 1889, for the choice of delegates to a Constitutional Convention to assemble at Cheyenne on the first Monday of September.

In obedience to this call of the Governor, fifty-five delegates were chosen, and September 2, 1889, forty-nine delegates, representing every county and both political parties, convened in the capitol at Cheyenne, and proceeded to frame a constitution, which was afterwards submitted to the popular vote, and was ratified by five sixths of the votes cast.

Although this may seem to be an informal mode, there having been no enabling Act passed by Congress, numerous precedents for such a course might be cited, for Vermont, Kentucky, Tennessee, Maine, Michigan, Arkansas, Florida, Iowa, Wisconsin, California, and Oregon proceeded in the same way to gain admission into the Union. And the subsequent admission of the State into the Union by Congress of course sanctioned the method pursued.

Idaho was organized as a Territory by Act of Congress, March 3, 1863, with the capital at Lewiston; but this was moved to Boise City in 1864.

No formal application for admission to the Union was made by the Legislature, but a general popular demand brought about the issuance of a proclamation by the Governor of the Territory for the election of delegates to a constitutional convention to convene at Boise City, July 4, 1889, to frame a State constitution; the qualification of delegates to this convention to be such as were then required by the laws of the Territory for members of the Territorial Legislative Assembly; the delegates to take the same oath of office required for such members; the election to be conducted, the returns made, the results ascertained, the certificates to persons elected to be issued, and the qualifications for voters thereat to be the same as were then provided by the laws of the Territory for general elections therein; the convention to be composed of

seventy-two members, as apportioned in this proclamation to the various counties in the Territory. The election thus provided for was held June 2, 1889, and the Constitutional Convention assembled at Boise City, July 4, 1889. It completed its work with rapidity, the constitution drafted being signed by sixty-six members, August 6, 1889. It provided for the submission of the constitution to the voters of the Territory on the 5th of November, 1889.

Pursuant to these provisions, the election was held November 5, 1889, and the constitution was ratified by a large majority. As thus enacted, it was presented to Congress, and the State of Idaho was admitted into the Union on the 3d of July, 1890.

The constitution we are next to examine is the fourth in Kentucky, not including the Secession Constitution of 1861; the first having been adopted in 1792, the second in 1799, and the third in 1849.

Under the influence of the wave of democratic ideas that about that time swept over the country, the latter instrument provided that the judiciary should be elected by the people. It provided also that all voting should be *viva voce*, which rendered it impossible to pass a ballot-reform law. Although it stipulated that the State could not incur any debt in excess of \$500,000, it did not provide against unlimited indebtedness of counties, towns, and cities. The natural consequence followed, that although the State was practically free from debt, the municipal indebtedness was very large. The recognition of slavery also had to be expunged. Many attempts to remove this recognition from the constitution of 1849 had been made, but all failed, because the provision concerning amendments thereof was so severe that to carry through any amendment whatever was almost impossible. Article 12 provided that first a majority of all the members elected to each house shall, within the first twenty days of any regular session, concur in passing a law for taking the sense of the people as to the necessity and expediency of calling a convention; and if at the next general election a majority of all the voters in the State are in favor thereof, then the next General Assembly shall direct the same to be done again; and then, if a majority of all the voters shall have voted for a convention, the next General Assembly shall pass a law calling a convention.

For the reasons given above, and in accordance with these provisions, in 1887, out of 300,339 registered voters, 175,362 voted in

favor of calling a convention ; and in 1889, out of 296,700 registered voters, 180,280 voted again for a convention.

The convention met at Frankfort, September 8, 1890, and was called to order by Governor Buckner. It consisted of one hundred delegates, of whom sixty were lawyers, twenty farmers, thirteen doctors, the remaining seven being capitalists, bankers, and merchants. The "Louisville Courier-Journal," the leading paper in the State, said that it included, as a rule, the best and most conservative men of the State.

It is not proposed to follow the history of the convention in detail. As the work progressed, it became manifest that no preservation of the old constitution with amendments and additions would do, but that a new constitution must be drafted. The convention continued in session until April, 1891, amidst much hostile criticism by the newspapers of the State as the results of its labors became manifest. Notwithstanding this, upon submission of the new constitution to the voters in August, 1891, it was ratified by a large and unexpected majority, in spite of the vigorous opposition of the "Louisville Courier-Journal" and other leading newspapers of the State. The convention was in session two hundred and fourteen days, and cost the State \$130,754, not including printing, mileage, stationery, coal, and gas; the total cost being estimated by opponents of the constitution as probably \$200,000.

In February, 1890, the Legislature of Mississippi passed an Act to call a convention to amend the constitution of the State. In accordance therewith, the delegates chosen met in Jackson, August 12, 1890, — ninety-eight in number, out of a total of one hundred and forty-four.

The work of this convention was not submitted to the people for ratification or rejection, but went into effect and became the supreme law in Mississippi by the mere fiat of the convention. At the end of the constitution we find these words : "This constitution, adopted by the people of Mississippi in convention assembled, shall be in force and effect from and after this the first day of November A. D. 1890."

On September 4, 1890 (Journal, p. 148), the Judiciary Committee, having been instructed to inquire into the constitutional power of the convention to adopt finally on behalf of the people of Mississippi the constitution which may be framed by it, without a submission of the question of ratification or rejection to the qualified electors of the State, reported that the proposition that such a

submission is necessary to give validity to the constitution "has no support in any principle of constitutional law, and is merely a political theory or doctrine which has, in some of the States, acquired authority from usage. The doctrine has never prevailed in this State, and has here no sanction from usage."

And again, October 30, 1890, (Journal p. 549), the Judiciary Committee reported that, in the judgment of the committee, submission of the new constitution to the people for ratification or rejection is unnecessary and inexpedient.

But Jameson on Constitutional Conventions, 4th ed., sections 410, 411, says, with great force,—and his opinion is supported by the best usage and authority,—that thus to make a new constitution operative without ratification by the people is wholly inadmissible, unless the law has so expressly provided. "The reason is that it would make of the convention a simple despot. . . . The history of liberty has shown that the most direct road to the ruin of a free State is to make a single popular assembly the dispenser of the ordinary law."

Besides this, the convention also exercised extraordinary power in passing "ordinances." One of these (Journal, p. 690) extended the terms of State officers. Another (Exemption Ordinance, Journal, p. 696) exempted from taxation for ten years "all permanent factories in this State hereafter established while this section is in force, for working cotton, wool, silk, furs, or metals, and all other manufacturing implements or articles of use in a finished state. Any factory which has been abandoned for not less than three years, and commencing operations within two years from the date of the adoption of this constitution, shall be entitled to such exception. This section may be repealed or amended by the Legislature after five years, and if not so repealed, shall remain in force until January 1, 1900, and no longer."

That is to say, this convention has impliedly declared that not even the people (through the Legislature) can, for five years to come, undo the work of this convention in exempting certain property from taxation.

It would seem that the whole ordinance is *ultra vires* and utterly void. It may, however be held, in the case of any one embarking in business in the State upon the faith of this exemption ordinance, and in the absence of legislation revoking it, that the State would be estopped from denying the legality and validity of the exemption.

There is certainly no excuse for the passage of such an ordinance, especially by a convention that does not submit its work to the electors for ratification. If this be legal, nothing they may pass is illegal. But there is some excuse for the ordinance extending the term of State officers until the new dates for election established in the constitution. The general principle is that a constitutional convention has power to pass ordinances or resolutions that are necessary and incidental to the completion of its work. So it is proper for a constitutional convention to fix a proper mode (*i. e.*, the mode now known as "Ballot Reform") to ascertain the will of the people on the question of ratification or rejection of the new constitution, and to do this in the shape of an ordinance, outside the constitution itself, because it is temporary. But this convention erred in its mode of establishing Ballot Reform for *all* State elections. If it decided in favor of Ballot Reform, and wished to legislate itself on the subject, it should have put the provision into the constitution. What is gained by having this outside the constitution, as an ordinance? It would have been much better to leave the whole matter to the Legislature, for doubtless time will soon disclose necessary amendments which now can only be introduced by amending the organic law itself.

It would be a curious subject of inquiry, what power this convention had to waive the payment of all moneys due the State for swamp-land, under an Act of the Legislature of the State. (See "Swamp Land Ordinance," Journal p. 693.)

As was to be expected, the most difficult subject the Mississippi Convention had to deal with was the race question; in every possible form does this problem of the negro keep turning up. Thus (p. 304 of the Journal), a resolution was introduced and referred to the Judiciary Committee, requesting this committee to report upon the legality and practicability of separating and apportioning the school fund of the State and counties to the white and black school children respectively, and whether such separation would be a violation of the Federal Constitution. The subject does not seem to have been reported upon; but section 207 of the new constitution provides that "Separate schools shall be maintained for children of the white and colored races."¹

¹ So in Kentucky, it is provided, section 174, in distributing the school fund, no distinction shall be made on account of race or color, but separate schools for white and colored children shall be maintained. Wyoming, Art. VII, Sec. 19, provides that no distinction or discrimination shall be made in its public schools on account of sex, race, or color.

Another proposition was (p. 352) that in all counties or school districts levying taxes to maintain schools for more than four months in the year, such additional taxes paid by whites should be applied to the maintenance of white schools, and those paid by negroes should be applied to maintain colored schools; with power to the Legislature to provide that such levy may be different in the same county as between the whites and blacks. This amendment was defeated by a small majority,—fifty-three yeas to fifty-seven nays.

A similar but even more sweeping amendment was proposed, providing that the Legislature shall have power to divide the school fund, so that all white schools should be supported by the funds collected from the white race, and all colored schools should be supported by the funds collected from the black race. It was laid on the table,—eighty-one yeas, twenty-one nays (Journal, p. 356 and 357).

It was also proposed to disqualify persons of color from holding office, as before stated; but common-sense finally prevailed, and (p. 485) the Judiciary Committee reported that having considered the subject, in their opinion such a provision would violate the spirit of the Constitution of the United States and the legislation of Congress in pursuance thereof, and would provoke the enforcement of the constitutional guarantee to the people of the United States of a republican form of government; whereupon the subject was dropped.

But the key-note to this new constitution of Mississippi is to be found in the provisions concerning the suffrage. After providing, in section 241, as usual, that electors shall consist of the male inhabitants twenty-one years of age, etc., and in section 243 for a uniform poll-tax on every male inhabitant of the State, to be used in aid of the common schools, section 244 provides that every elector shall also be able to read any section of the constitution, or shall be able to understand the same when read to him, or give a reasonable interpretation thereof.

Reading between the lines, it is easy to see that the effort is here made, while ostensibly acting in accordance with the Fourteenth Amendment to the Constitution of the United States, to set up a system under which whites can vote, and blacks cannot. For with the strong race feeling in the South, and with the offices and power in the possession of the whites, it will prove an easy matter for a board of registration to find that all white applicants are able

to understand a section of the constitution when read to them, or can give a reasonable interpretation thereof, and that no black man can do either. If this be sustained by the United States Supreme Court, it furnishes an easy way to evade the Fourteenth Amendment, and other Southern States will soon follow the same course.

Mr. Bryce, in the "North American Review," for December, 1891, p. 657, well says, concerning this section of this constitution: "This curious provision might, no doubt, be so administered by a perfectly upright and impartial authority as to admit substantially competent and exclude incompetent persons, irrespective of color. But it has a suspicious air. One may conjecture that a white official will be more readily satisfied with the 'reasonable interpretation' which a brother white gives of some section, say this section, of the constitution, than with the explanation tendered by a negro applicant. Such discrimination will be all the easier because illiterate whites as a rule understand the matter better than illiterate negroes."

Great credit is certainly due to every Southern State that explicitly denies in its constitution the right of secession, after the sacrifices and bloodshed it passed through between 1861 and 1865 to establish that right. Mississippi takes this stand, and its noble course must be cited in its own words: "Section 7. The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the government of the United States." There was opposition to this section, and a substitute was proposed, declaring that the State, a "co-equal member of an indissoluble Federal Union of indestructible States," would never assume the right to withdraw from the Union. A member of the convention, General Lee, the officer who carried the order to open fire on Fort Sumter in 1861, said to the convention he was convinced that secession was not only impracticable, but was wrong, and he believed that those who had carried muskets for four years in the service of the Confederacy were of the same conviction; whereupon the proposed substitute was voted down.

Mississippi (sec. 15) and Kentucky (sec. 25) in their new constitutions explicitly state that slavery is forbidden. While this is of course only in conformity with the Thirteenth Amendment of the Constitution of the United States, and in the constitutions of Northern States would be passed by as a matter of course, yet in

the constitutions of the old Slave States it is evidence of the complete official recognition and acceptance of the new order of things, and as such is worthy of note.

In his excellent paper on "Recent Constitution-making in the United States," in the September, 1891, number of the "Annals of the American Academy of Political and Social Science," Professor Thorpe, speaking of a similar clause in the Constitution of North Dakota, cites it as an illustration of the persistence of political ideas long after the necessity for the prohibition has passed away. For certainly the clause is unnecessary in any constitution, now that the Thirteenth Amendment has abolished slavery in the United States. But such a clause in the new constitution of an old Slave State has a very different meaning. It has there the peculiar force of express denial of that which was formerly so dear to their citizens, and to perpetuate which they ventured all and lost so much.

As regards the qualifications required to exercise the right of suffrage, all these new constitutions are liberal, and in line with the prevailing spread of democratic principles (except as above noted). In Mississippi (sec. 241), every male inhabitant of the State, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, duly registered, etc., and twenty-one years old (omitting other details not important here), is declared to be an elector. Similar liberality is shown in Kentucky (sec. 151). In Idaho (Art. VI. sec. 2), every male citizen of the United States, twenty-one years old, six months a resident in Idaho, duly registered, is a qualified elector, and women may continue to hold such school offices and vote at such school elections as while Idaho was a Territory. The danger of polygamy has made it necessary for this State (Art. VI. sec. 3), to exclude polygamists, as well as Chinese and Indians not taxed, — the latter a common provision. Wyoming bears off the palm in liberality, and is the first State to adopt female suffrage. Art. VI. Sec. 1, provides that the right of citizens of the State to vote and hold office shall not be denied or abridged on account of sex, and that both male and female citizens of the State shall equally enjoy all civil, political, and religious rights and privileges. Electors shall be citizens of the United States (Art. VI. sec. 5), and able to read the Constitution of the State (Art. VI. sec. 9).

Mr. Thorpe, in his excellent article on the constitutions of North Dakota, South Dakota, Montana, and Washington, already referred

to, after tracing the various currents of immigration that have peopled the Western and Pacific States, says (p. 11) that the recent coast stream has combined both Northern and Southern elements, and reaching Washington and Montana by a backward flow, presents for the first time in our national history a meeting of Northern and of Southern elements north of the latitude of Kansas. We have been informed by high authority — one of the judges of the Supreme Court of Wyoming — that the same admixture of Northern and Southern elements is to be found in Wyoming, the men being often Northerners, and therefore generally Republicans, and the women Southerners and Democrats. There are many marriages between these apparently discordant elements, yet both the husband and the wife exercise their right of suffrage with no more friction than do the members of a business firm, or of a family who do not agree in politics.

While thus on the subject of equal rights, irrespective of sex, let us note the provision in Mississippi (sec. 94), that the Legislature shall never create any distinction between the rights of men and women to acquire, own, enjoy, and dispose of property, or to contract in reference thereto; and married women are declared to be fully emancipated from all disability on account of coverture. It is to be hoped that intelligent legislation will follow immediately, for, without it, nice questions will arise (or probably already have arisen) whether dower and tenancy by the curtesy are abolished, or which shall prevail as the law for both sexes.

The Australian Ballot Reform has now been so generally adopted throughout the United States that we are not surprised to find it adopted in all these constitutions (Kentucky, sec. 154; Idaho, Art. VI. sec. 1; and Wyoming, Art. VI. sec. 11). Mississippi (sec. 240) declares that all elections by the people shall be by ballot, adopting the Australian system by an elaborate "Election Ordinance," after section 285, already referred to.

An examination of some of the new features in the Bills of Rights of these new constitutions shows the trend of political development at the present day. We may here group various provisions that show the prevalent tendency towards an extension and equalization of rights, irrespective of sex, race, or nativity.

In Wyoming (Art. I. sec. 3), "Since equality in the enjoyment of natural and civil rights is made sure only through political equality, the laws of this State affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any

circumstance or condition whatsoever other than individual incompetency or unworthiness, duly ascertained by a court of competent jurisdiction."

And in the same State (Art. I. sec. 29), "No distinction shall ever be made by law between resident aliens and citizens as to the possession, taxation, enjoyment, and descent of property."

In Idaho (Art. I. sec. 20), "No property qualification shall ever be required for any person to vote or hold office, except in school elections, or elections creating indebtedness."

The provisions in Mississippi (sec. 94), against any distinction between the property rights of men and women and the emancipation of married women from all disability on account of coverture, are also noteworthy.

Perhaps the singular provision in Kentucky (sec. 24), "Emigration from the State shall not be prohibited," would come under this head, although it is not easy to conceive of any denial of the right to live wherever one pleases in the United States!

Equally marked is the prevalent tendency towards humanitarianism shown in these Bills of Rights (Wyoming, Art. I. sec. 15), "The penal code shall be framed on the humane principles of reformation and prevention."

Wyoming (Art. I, sec. 12), "No person shall be detained as a witness in any criminal prosecution longer than may be necessary to take his testimony or deposition, nor be confined in any room where criminals are imprisoned."

So of the provisions prohibiting imprisonment for debt, unless fraud be found (Idaho, Art. I, sec. 15; Wyoming, Art. I. sec. 5), or strong presumption of fraud; and the debtor shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law (Kentucky, sec. 18).

See also Idaho, Art. XIII., entitled "Immigration and Labor," and Wyoming, Art. XIX. sec. 1, "Concerning Labor" ("eight hours' actual work shall constitute a lawful day's work in all mines and on all State and municipal works"), and sec. 1, "Labor Contracts," making unlawful all contracts or agreements waiving liability for injuries to the person.

Kentucky (sec. 21) even goes so far as to provide that "the estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof."

All four of these Bills of Rights contain inhibitions of criminal proceedings by information, except in cases arising in the land or naval forces, or in the militia in actual service in time of war or public danger, etc. (Mississippi, sec. 27; Kentucky, sec. 12; Idaho, Art. I. sec. 8; Wyoming, Art. I. sec. 13); but in the latter State it may be otherwise provided by law. Here is probably another instance of survival. Certainly in a democracy, where the prosecuting officer is elected by the people, there is no danger of abuse of the power of proceeding by information.

In the matter of trial by jury, Idaho (Art. I. sec. 7) provides that in civil actions three fourths of the jury may render a verdict, and the Legislature may provide that in all cases of misdemeanors five sixths of the jury may render a verdict.

Wyoming (Art. I. sec. 9) provides that a jury in civil cases, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law. A grand jury may consist of twelve men, any nine of whom, concurring, may find an indictment; but the Legislature may change, regulate, or abolish the grand-jury system.

In some of these changes of the common law in these States, as in similar changes made in Washington, Montana, North and South Dakota (see Prof. Thorpe's article already cited, p. 175), we see the common-sense embodiment of the idea now so prevalent that the rule requiring uniformity of opinion on the part of a jury should be given up. The result will be watched with interest in other States that so far have lacked courage to make the change; and if successful, as it probably will be, will soon be followed.

The persistency of political ideas long after the cause for the existence of laws to enforce them is past, is well illustrated by the provisions in these new constitutions preserving the right of the jury to determine the law as well as the facts in cases of libel (Mississippi, sec. 13; Kentucky, sec. 9; Wyoming, Art. I. sec. 20). One strong cause of the retention of this power in criminal cases in general, was the apprehension felt of the judge who, in England, was the creature of the Crown. This would be especially the case in indictments for libel, particularly if the alleged libel were against the Government. Whatever may have been the necessity for such a rule in England, it is clear there has been no necessity for it here since the Declaration of Independence. Still, it has been copied in constitution after constitution, even down to the present day.

It is further to be noticed that in Mississippi (sec. 20) and in Kentucky (sec. 9) the jury may determine the law as well as the facts in criminal cases of libel only; but in Wyoming (Art. I. sec. 20) they have this power in civil cases of libel as well as in criminal cases. It would be curious to inquire into the cause of this extension of an already unnecessary power.

The common clause in constitutions forbidding the taking of private property for public use without compensation, and its treatment in these new constitutions, is also worthy of notice.

The narrowing influence of the common law upon lawyers is shown by the fact that this provision has been strictly construed by the courts, instead of being liberally construed, as all provisions should be when the rights, property, or liberty of the subject are affected, against his will, for the general good. It is unnecessary to cite cases, for it is well known to all lawyers that the rule of decision has been that if there is no actual *taking*, there is no claim to compensation, no matter how much the property may be injured,—even admitting there has been a tendency of late to relax this rule.

To make sure of justice, several States, since 1869, have embodied in their constitutions provisions that private property shall not be “damaged” or “injured,” as well as “taken,” for public purposes without compensation. Even this has not always been enough, however; for the construction of these provisions has not been uniform. See *Stetson v. C. & E. R. Co.*, 75 Ill. 74; *C. M. & S. P. R. Co. v. Hall*, 90 Ill. 42; *contra*, *Rigney v. Chicago*, 102 Ill. 64; *P. S. V. R. Co. v. Walsh*, 124 Penn. 544.

The new constitution of Mississippi, following the above innovation on the old rule, provides (sec. 17) that private property shall not be taken or damaged for public use, except on due compensation being first made to the owner in a manner to be prescribed by law. It further provides that the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public. So in Wyoming (Art. I. sec. 33), “Private property shall not be taken or damaged for public or private use, without just compensation.” And section 32 in the same State, enlarging the power of eminent domain, provides that private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches, on or across the lands of others, for agricultural, mining,

milling, domestic, or sanitary purposes; nor in any case without due compensation. But in Kentucky, in spite of the jealousy shown towards corporations, section 13 only provides that a man's property shall not be taken or applied to public use without just compensation being previously made to him; and it is also remarkable that Idaho retains the old imperfect form.

In Wyoming (Art. I. sec. 31), we find an illustration of the extension of the power of the State when the public good requires it: "Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved." So in Idaho (Art. I. sec. 14), but much more fully, the necessary use of lands for mining, or for the construction of reservoirs for purposes of irrigation, or for drainage, with the necessary pipes, etc., "or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State."

In one important respect provision is made to remedy a serious defect in the older constitutions. Wyoming (Art. I. sec. 8), provides, "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." The same provision is to be found in Kentucky, but placed among the "General Provisions" (sec. 240), near the end of the constitution.

Bigamy and polygamy are prohibited in Idaho (Art. I. sec. 4),—pointing to a danger from which this State has thus escaped.

In Wyoming (Art. I. sec. 19), "No money of the State shall ever be given or appropriated to any sectarian or religious society or institution,"—as if to render more certain than ever the complete separation of Church and State. In Mississippi (sec. 18), religious liberty, however, shall not be construed "to exclude the Holy Bible from use in any public school in this State." In Kentucky (sec. 5), "Nor shall any man be compelled to send his child or children to any school to which he may be conscientiously opposed."

And in conclusion of this examination of some of the new features in these Bills of Rights, there is in Mississippi (sec. 20) the unique provision: "No person shall be elected or appointed to office in this State for life or during good behavior, but the term of all offices shall be for some specified period."

The provisions concerning corporations in these constitutions

illustrate the increasing complexity of our life and times, the extent to which legislation is embodied in constitutions, and the fears entertained that corporations will abuse their powers unless restrained by constitutional restrictions, and that weak or corrupt Legislatures will legislate in their favor, unless they, too, are similarly restrained. In each State a special subdivision is devoted to them.

Corporations are defined in Mississippi (sec. 199) to include all associations and all joint-stock companies for pecuniary gain, having privileges not possessed by individuals or partnerships. Similarly, in Idaho (Art. XI. sec. 16), the term includes all associations and joint-stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. In Kentucky (sec. 216) "corporation" embraces all joint-stock companies and associations.

In Kentucky (sec. 3) "Every grant of a franchise, privilege, or exemption shall remain subject to revocation, alteration, or amendment." So in Mississippi (sec. 178). In Idaho (Art. I. sec. 2), "No special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the Legislature." The language used in Wyoming (Art. I. sec. 30), is not so clear and explicit. "Corporations, being creatures of the State, endowed for the public good with a portion of its sovereign powers, must be subject to its control."

Corporations shall be formed under general laws only (Miss., sec. 178 ; Idaho, Art. XI. sec. 2 ; Wy., Art. X. sec. 1). In Mississippi (sec. 178) no charter for any private corporation for pecuniary gain shall be granted for more than ninety years.

No corporation in existence at the adoption of the new constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this constitution (Ky., sec. 198 ; Wy., Art. X., sec. 5 ; Miss., sec. 179 ; Idaho, Art. XI. sec. 7); but in the last State, municipal corporations in existence at the time of the adoption of the new constitution are excepted.

No foreign railroad corporation shall be entitled to exercise the right of eminent domain, or to any right of way, or to acquire real estate for any purpose, until it shall become a body corporate pursuant to the laws of the State (Ky., sec. 219).

In Mississippi (sec. 197) no grant of any right or privilege and no exemption from any burden shall be made to any foreign corpo-

ration, except on condition that organization shall first be affected under the laws of this State and the business of such corporation shall be carried on thereunder.

No corporation formed under the laws of another State shall have any greater privileges than those enjoyed by corporations of similar character created under the laws of this State (Idaho, Art. XI. sec. 10).

Any consolidation of a corporation of Kentucky (sec. 208) with a corporation of another State shall not make it a foreign corporation, but the courts of this State shall retain jurisdiction over that part of the corporate property within the limits of this State. This may give rise to conflict with some law passed by Congress under its power to regulate interstate commerce. To the same effect see Idaho (Art. XI. sec. 14).

Following the lead of California and Washington, Idaho (Art. XII. sec. 1) directs the Legislature to provide by general laws for the incorporation, organization, and classification of cities and towns in proportion to the population.

The property of all private corporations for private gain shall be taxed in the same way and to the same extent as the property of individuals (but banking capital, according to the value thereof, etc.) (Miss., sec. 181); but provision may be made by general laws to authorize cities and towns to aid and encourage the establishment of manufactories, gas-works, water-works, and other enterprises of public utility, other than railroads, within the limits of said cities or towns, by exempting all property used for such purposes from municipal taxation for a period not longer than ten years (Miss., sec. 192).

The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, but the Legislature may grant exemption from taxation for not more than five years in the encouragement of manufacturing and other new enterprises of public utility, but this shall be done by general laws only (Miss., sec. 182). In addition this convention also passed the "Exemption Ordinance" already cited in full (p. 19).

The right to exercise the power of eminent domain over the property and franchises of all corporations is expressly reserved (Miss., sec. 190; Ky., sec. 203; Idaho, Art. XI. sec. 8; Wy., Art. X. sec. 9, and Art. X. sec. 4, "Railroads"). In all these States in these sections, excepting Wyoming, the right to exercise the police power of the State is also expressly reserved.

No foreign railroad or telegraph line shall do any business without having an agent or agents within each county through which it shall be constructed upon whom process may be served (Wy., Art. X. sec. 8, "Railroads"). In Kentucky (sec. 202), all corporations must have one or more known places of business in the State, and an authorized agent or agents there. So in Idaho (Art. XI. sec. 10).

The influence of the legislation and decisions upon the important class of subjects now known as "Trusts" is apparent throughout these constitutions.

Idaho (Art. XI. sec. 18) prohibits the direct or indirect combination or contract of corporations, associations of persons or stock companies, in any manner whatsoever, to fix the price or to regulate the production of any article of commerce, or of produce of the soil, or of consumption by the people. Wyoming (Art. X. sec. 8) prohibits consolidation or combination of corporations of any kind to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare. In Kentucky (sec. 206) it is made the duty of the General Assembly, as necessity may require, to enact laws to prevent all trusts, pools, combinations, or other organizations from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.

No transportation corporation shall issue stocks or bonds, except for money, labor done, or in good faith agreed to be done, or property actually received; and all fictitious increase of stock or indebtedness shall be void (Miss., sec. 196).

No corporation shall engage in business other than that expressly authorized by its charter. Nor shall it hold any real estate except such as may be proper and necessary for carrying on its legitimate business for a longer period than five years, under penalty of escheat (Ky., sec. 200); and no corporation doing business as a common carrier shall, directly or indirectly, own, manage, operate, or engage in any other business, or hold, own, lease, or acquire, directly or indirectly, mines, factories, timber or lands, except such as shall be necessary to carry on its business (Ky., sec. 218). Similarly in Wyoming (Art. X. sec. 6) no corporation shall have power to engage in more than one general line or department of business, which line shall be distinctly specified in its charter.

No common carrier shall consolidate or pool its earnings, in whole or in part, with any other common carrier company owning

a parallel or competing line, or operate the same; nor shall any combination or contract be made between common carriers by which the earnings of one doing the carrying are to be shared by the other, not doing the carrying (Miss., sec. 197).

The familiar principle of law that an employer is not liable for injury to his servant caused by the negligence of a fellow-servant is further abrogated as to railroads in Mississippi (sec. 193). Any agreement, express or implied, to waive the benefit of this section shall be null and void, and the Legislature is authorized to extend the remedies herein provided to any other class of employers. In Wyoming (Art. X. sec. 4) no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person, and any contract or agreement with any employee waiving such right shall be void. The employees of all corporations doing business in this State are to be protected by legislation from interference with their social, civil, or political rights by said corporations, their agents or employees (Miss., sec. 191).

Idaho (Art. XI. sec. 17) provides that dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him.

It seems strange that the individual liability of stockholders, a subject of the first importance, should not be determined in the other constitutions under consideration, especially when we find them all treating so minutely of less important matters that should have been left to legislation.

All corporations engaged in the transportation of persons, property, mineral oils and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipe lines, and telephones, are common carriers (Wyoming, Art. X. sec. 7). So in Mississippi (sec. 195), are express, telegraph, telephone, and sleeping-car companies.

Any association, corporation, or lessees or managers thereof, organized for the purpose, or any individual, may construct and maintain telegraph or telephone lines, and connect the same with other lines (Idaho, Art. XI. sec. 13; Ky., sec. 207), with the additional provision that said companies shall receive and transmit each other's messages without unreasonable delay or discrimination; and all such companies are common carriers. But cities or towns shall control their own streets, etc., and designate where and how the wires of said companies shall be erected or laid. All store-

houses where grain or other property is stored for compensation, whether the property stored be kept separate or not, are declared to be public warehouses, and subject to legislative control (Ky., sec. 214).

All railroads are public highways (Miss., sec. 184; Idaho, Art. XI. sec. 5). The rolling-stock of railroad corporations is personal property (Miss., sec. 185; Ky., sec. 220). Any company organized for such purpose, under the laws of the State, may construct and operate a railroad between any points within the State, and connect at the State line with roads of other States (Miss., sec. 184; Idaho, Art. XI. sec. 5). The Legislature may regulate and control by law, rates of charges and freights (Idaho, Art. XI. sec. 5). Every railroad company may intersect, connect with, or cross any other railroad (Miss., sec. 184; Ky., sec. 225 [when reasonable, Idaho, Art. XI. sec. 5]; Wyoming, Art. X. sec. 1, "Railroads"), with the additional statement in the last and in Mississippi that all railroads shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.

No railroad shall pass within three miles of any county seat without passing through it, and establishing and maintaining a depot therein, unless prevented by natural obstacles, if such town or its citizens shall grant the right of way through its limits, and sufficient ground for ordinary depot purposes (Miss., sec. 187). The similar provision in Wyoming (Art. X. sec. 9, "Railroads") is that no railroad company shall construct or maintain a railroad within four miles of any existing town or city without providing a suitable depot at the nearest practicable point for the convenience of said town or city, and stopping there all trains doing local business; and no railroad company shall deviate from the most direct practicable line to avoid the provisions of this section. Idaho (Art. XI. sec. 11) recognizes the principle of local control by providing that no railroad shall be constructed in any city, town, or incorporated village without the consent of the local authorities.

In Wyoming (Art. X. sec. 5, "Railroads"), neither the State nor any county, township, school district, or municipality shall loan or give its credit, or make donations to or in aid of any railroad or telegraph line. In Idaho (Art. XI. sec. 12), the Legislature shall pass no law for the benefit of a railroad, corporation, individual or association of individuals, retroactive in its operation.

No county, city, or town, etc., shall subscribe to the capital stock of any corporation or association, or make appropriation or loan its

credit in aid of such corporation or association (Miss., sec. 183; Idaho, Art. XII. sec. 4).

The provisions of the Interstate Commerce Act against greater charge for a shorter than for a longer haul, etc., are followed in Kentucky (sec. 227), and in Idaho (Art. XI. sec. 6).

So the Legislature is directed to pass laws to prevent abuses, unjust discrimination, and extortion (Miss., sec. 186; Idaho, Art. XI. sec. 6; Ky., secs. 204, 221, 222, 223). No common carrier shall be permitted to contract for relief from its common-law liability (Ky., sec. 204). No corporation can lease or alienate any franchise so as to relieve the franchise or property from any liability connected therewith (Ky., sec. 211; Idaho, Art. XI. sec. 15).

No transportation company shall grant free passes or tickets or passes or tickets at a discount to members of the Legislature, or to any State, district, county, or municipal officers, except to railroad commissioners (Miss., sec. 188). In Kentucky (sec. 205), the inhibition is even more severe, judges being also named as included, and no exception is made in favor of railroad commissioners, although a commission is established under section 217; and the penalty for receiving or using such a free pass is declared to be the forfeiture of office.

Common carriers must be made by law to extend the same equality and impartiality to all who use them, excepting employees and their families, and ministers of the gospel (Wy., Art. X. sec. 2, "Railroads").

Wyoming (Art. IX. sec. 3, "Railroads") is the only one of these States that provides that an annual report shall be made to the State auditor of its business, and even in this State this applies only to railroad corporations.

Amasa M. Eaton.

THE SUPREME COURT AND MUNICIPAL BONDS.— ANOTHER STEP.

IN the HARVARD LAW REVIEW for November, 1891, we ventured to question the soundness of the reasoning approved by the Supreme Court of the United States in an opinion delivered by Mr. Justice Lamar in *Merrill v. Monticello*.¹ That opinion, we there said, virtually asserted the doctrine that although there be conferred upon a municipal corporation a power to borrow money, such corporation has no power to raise the money by selling its bonds; or, to express the proposition in another form, that a power in the charter to borrow money does not include the power to give a negotiable bond therefor.

The conclusion reached in that case evinced a wide departure from what had been regarded for many years as the settled rule. A great many savings institutions, insurance companies, trustees, and private persons seeking safe investment, had accustomed themselves to treat, as a firm foundation for their action, a rule so obviously just in its inception, and so long upheld by the Supreme Court. In examining municipal securities offered to them with a view to purchase, these investors, fully confident that the doctrine so long established would never be departed from, confined their inquiries to other points of scrutiny than that of the power to issue. Where a charter empowered a municipality to borrow, the careful trustee looked to see for what *purpose* the money was to be borrowed, not dreaming that it would be objected at some future day that the bond was worthless, unless special legislative authority could be shown for its issue. The line of reasoning adopted in *Merrill v. Monticello* must have struck the public who are interested in the subject as remarkable for the consequences that would logically follow.

We need hardly say that, reluctant as we were to enter upon such criticism, we felt amply justified in calling the attention of the profession to the views sanctioned by the court in that opinion. We tried to subject Mr. Justice Lamar's observations to the test

¹ 138 U. S. 673.

of as searching an analysis as it was in our power to give to them, hoping that we might uncover the precise reasons for advancing what to us appeared to be a new and mischievous doctrine. With all proper respect for so able a Bench, we were unable to satisfy ourselves that the steps taken to reach the result in that decision were correct. On the contrary, the reasoning appeared to be fallacious and unsound.

The doctrine there advanced is plainly at variance with that of *Rogers v. Burlington* (1865),¹ and *Mitchell v. Burlington* (1866).² But the opinion of Mr. Justice Lamar did not in terms overrule these early decisions. It has been left to the court at the present term to take this step, and to announce that the later cases in this court are to be regarded as overruling the two decisions mentioned. This announcement, it is apparent, must be understood as the judicial interpretation of what *Merrill v. Monticello* really means. The announcement is made in *The City of Brenham v. The German-American Bank*, decided March 28, 1892, Mr. Justice Blatchford delivering the opinion of the court, Justices Harlan, Brewer, and Brown dissenting.³

Because the stand now taken by the court reverses the settled doctrine of years, and threatens to lead to consequences that are far-reaching and greatly to be deplored, — in plain words, because of the mischief that these views are likely to work if they shall be adhered to, — we think that we are warranted in returning to the subject for the purpose of submitting one or two further considerations that bear upon the fallacy of the underlying proposition upon which this novel doctrine is sought to be based.

We may, therefore, state briefly the material facts of the Brenham case, and quote the language of the learned justice, in which he declares that the city had no power to issue the bonds in question.

The city of Brenham, Texas, plaintiffs, by writ of error to the Circuit Court of the United States for the Western District of Texas, sought to reverse a judgment against it for \$5,510 upon its coupons. The bonds were of an issue of \$15,000 in the usual form, bearing interest at ten per cent, and dated July 31, 1879.

¹ 3 Wall. 654.

² 4 Wall. 270.

³ The case was argued while the late Mr. Justice Bradley was on the bench. Upon his death, the court, consisting of eight justices, ordered a re-argument. The decision, therefore, is that of five justices to three.

On their face they bore the title, "Bonds for General Purposes," and referred to an ordinance of the city authorizing their issue.

The Legislature of Texas, it seems, passed an Act, Feb. 4, 1873, incorporating the city of Brenham. Its population was over four thousand and less than ten thousand inhabitants. The charter, among other things, provided "That the city council shall have the power and authority to borrow for general purposes not exceeding (\$15,000) fifteen thousand dollars on the credit of said city." Another article of the Act of Incorporation reads: "Bonds of the corporation of the city of Brenham shall not be subject to tax under this Act."

The city council, June 7, 1879, by ordinance voted to issue \$15,000 ten per cent coupon bonds, to be sold by the mayor and finance committee as the same might be required for general purposes, but at no greater discount than five per cent. The bonds were issued under date of July 31, 1879. Three thousand dollars were used for the fire department. The remaining twelve thousand (of which the German-American Bank, of New York city, became eventually the owners) were devoted to the purchase of depot grounds, and of the right of way of a railroad through the city.

At the argument, certain sections of one of the articles of the constitution of Texas of 1876, respecting the right of cities to lay, assess, and collect taxes, were alluded to; but they are not material to the present discussion, seeing that the court has put its decision upon the ground of a want of power in the charter to issue a negotiable bond, irrespective of any consideration of the effect of the constitution.

The court below (Boorman, J.) charged the jury (35 Federal Reporter, 185) that the power in the city to borrow money carried with it the authority to issue the bonds. "It may be that the limitation of the power to tax beyond one quarter of one per cent impairs the ability of the defendant to pay the bonds and coupons; but I do not think it denies the capacity of the corporation in 1879 to issue the bonds as commercial paper and bind the constituency to the payment thereof." To this instruction the defendant excepted, on the grounds, *first*, "that under the constitution of Texas the expense of carrying out the general governmental purposes of the defendant is to be defrayed by the levy of a tax, and not by the issuance of bonds; and, *second*, that the bonds are not clothed with the incidents of commercial paper."

The point as to the want of authority to issue the bonds was also

raised by demurrer. The demurrer was overruled, and the defendants saved their exception.

Mr. Justice Blatchford says: "The principal contention on the part of the defendant is, that it was without authority to issue the bonds, and that they were void for all purposes and in the hands of all persons. This point is presented with reference to the charter of 1873, considered apart from the provisions of the constitution of 1876, and also with reference to the effect which the constitution had upon the power claimed under the charter."

In order justly to estimate the force of the reasoning adopted by the court, it becomes needful to quote freely from Mr. Justice Blatchford's opinion. After citing from the article of the constitution conceived to be applicable, the justice proceeds as follows:

"There is nothing in the charter of the defendants which gives it any power to issue negotiable interest-bearing bonds of the character of those involved in the present case. The only authority in the charter that is relied upon is the power given to borrow, for general purposes, not exceeding \$15,000, on the credit of the city. The power given to the defendant by Section 4 of Article XI. of the Constitution — the defendant having a population of less than ten thousand inhabitants at the date of its charter and at the date of the ordinance — was only the power to levy, assess, and collect an annual tax to defray the current expenses of its local government, not exceeding for any one year one fourth of one per cent.

"That in exercising its power to borrow not exceeding \$15,000 on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a *bona-fide* holder. In the present case, it appears that Mensing bought from the defendant \$5000 of the bonds at ninety-five cents on the dollar, and that other \$7000 of the bonds were sold by the city for the same price, it thus receiving only \$11,400 for \$12,000 of the bonds, and suffering a discount on them of \$600. The city thus agreed to pay \$12,000, and interest thereon, for \$11,400 borrowed. This shows the evil working of the issue of bonds for more than the amount of money borrowed. . . .

"The power to borrow the \$11,400 would not have been nugatory, unaccompanied by the power to issue negotiable bonds therefor.¹

"The confining of the power in the present case to a borrowing of

¹Merrill v. Monticello, 138 U. S. 673; Williams v Davidson, 43 Tex. 1; City of Cleburne v. Railroad Co., 66 Tex. 461; 1 Dillon on Municipal Corp., 4th ed., § 89 and notes, § 91, n. 2; § 126, n. 1; §§ 507, 507 a.

money for general purposes on the credit of the city, limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually, for at least ten years. It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The opinion then proceeds to review a number of cases, ending with *Merrill v. Monticello*, from which the justice quotes at considerable length, and closes by saying: "As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons."

What is likely first to attract the reader's attention is the fact that the opinion rests the decision of the case squarely upon the ground that the power given the city by charter to borrow money for general purposes does not authorize the city to issue negotiable bonds. We wish in this article to be understood as not passing upon the question of the validity of the bonds generally; we are concerned only with the doctrine of the meaning of a power granted a municipal corporation to "borrow money."

The highly important inquiry as to the legitimacy of the purpose for which the bonds were to be used, appears to have been considered here as of little moment. True, the court says that the power of the city to borrow is limited to borrowing "money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation." But the court does not go on to determine whether the purposes disclosed were within the scope of such general purposes as the city was empowered to borrow money for. To purchase hose and pay for a steam fire-engine, might seem appropriate purposes; but to buy depot grounds, and the right of way for a railroad, are purposes that perhaps would admit, to say the least, of some doubt. The fact that the opinion attaches no significance whatever to the object for which the bonds were actually used, but directs its entire reasoning to the question of the true meaning of the power to borrow money, commits the court all the more strongly to the proposition which,

as has already been indicated, we cannot but regard as wholly unsound.

The example given by Mr. Justice Blatchford of the "evil working of the issue of bonds for more than the amount of the money borrowed," and the mention of a presumption that the grant of power in the charter was not intended to "plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum semi-annually for at least ten years," are well designed to satisfy the reader that the city of Brenham, Texas, in 1879, could not borrow at a rate quite so favorable as the city of Boston, Massachusetts. The court are careful, however, not to decide that the purpose was *ultra vires*.

In this connection it may be remarked that there is much good sense in what Mr. Justice Grier says, in one of the earliest of the these bond decisions :—

"Although we doubt not the facts stated as to the atrocious frauds which have been practised in some counties in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators,' are pleas that might have just weight in an application to retain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation after they have been negotiated and have come into the possession of *bona-fide* holders."¹

Let us endeavor to ascertain, then, by just what process of reasoning it is that the learned justice arrives at the conclusion that the city of Brenham had no power under its charter to issue a negotiable bond.

The prevailing thought in the judicial mind appears to be that to borrow money is one thing,—to give a negotiable bond as a means of borrowing money is another and a distinct thing. The power to give certificate of indebtedness or a voucher does not, says the opinion, "cover the right to issue negotiable paper or bonds unimpeachable in the hands of a *bona-fide* holder."

Certainly not. They are two different rights. But both of them are methods of borrowing money. It is not apprehended that the bank in this case claimed that the city's right to issue the bonds was "covered" by its undisputed right to give to its creditor an ordinary certificate of indebtedness. Mr. Justice

¹ Mercer County v. Hackett (1863), 1 Wall. 96.

Blatchford quotes with approval the following language of Mr. Justice Lamar in *Merrill v. Monticello*: "To borrow money and to give a bond or obligation therefor which may circulate in the market as a negotiable security freed from any equities that may be set up by the maker of it, are in their nature and in their legal effect essentially different transactions."

Now we undertake to say that confusion of thought is betrayed in the proposition just stated. It is not true in the sense in which it is here used. To borrow the money for which the bond is given (and that is the only money that figures in the business), and to give the bond, is but one transaction. When a bank customer borrows a hundred dollars from the bank, and gives his promissory note therefor, there are not two transactions. Borrowing money from a bank *means* giving a note.

To give an evidence of indebtedness as a voucher, to pass a promissory note, to hand over a negotiable bond, — what are these acts but so many modes of executing the same power; namely, a power to borrow money? It is usual and customary — nay, it is universal — when sums of money of any considerable amount are borrowed, for the debtor to give his negotiable note or bond for its payment. The creditor does not lend except he receives at the same time, and as a part of the transaction, this kind of a security. A power to borrow implies, *ex vi termini*, the right to issue negotiable paper to secure payment of the sum borrowed.

Article I., Section 8, of the Constitution of the United States empowers Congress to "borrow money on the credit of the United States." Has any one been heard to question the authority of Congress, under this clause, to provide for the issuing of negotiable bonds of the United States? If it be asked why not, the reply is obvious: Because Congress, being empowered to borrow money, has the exclusive right to determine upon the time when the necessity shall have arisen for resorting to its exercise, as well as the means by which the money can most conveniently be obtained. To put down the rebellion, the government "borrowed money" of its citizens and of Europe. Borrowing the money and issuing the bonds were not two entirely distinct transactions.

The powers of a municipal corporation are limited, of course, by its charter. Every one admits that it is wise and prudent to restrict such bodies within certain well-defined bounds. This useful end may be attained, however, by applying circumspection to the *purposes* for which the corporate body is allowed to exercise its chartered powers.

Has a city the right to borrow money for general purposes? A strict rule may with great propriety narrow the limits within which the term "general purposes" shall be applied. Such, indeed, is the field for the legitimate exercise of this safe principle of construction; but it is error to maintain that such a principle has application to the mode of effectuating a power to borrow.

Mr. Justice Blatchford reviews the prior decisions of the Supreme Court; but it is unnecessary to follow him here, because his steps are simply a repetition of those taken by Mr. Justice Lamar in the *Monticello* case. And it is upon the *Monticello* decision that the present opinion practically rests; so that it may be said that the reasoning offered to us is that upon which comment has already been made in our November article. It substantially amounts to this, that a municipal corporation has limited powers only; it can do only certain things; or, as Mr. Justice Field well phrases it, —

"Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of these purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court."¹

To issue negotiable bonds we are told is to "plunge the municipal corporation into debt," which leads to abuses; and the Legislature may, if it see fit, grant the right, but city councils ought not to have it unless given in special terms. Hence, inasmuch as it is one thing to borrow money and an essentially different thing to give a negotiable bond therefor, it follows that when the Legislature empowers a city to borrow money, it means that the city may give a certificate of indebtedness to the creditor that is non-negotiable, nothing more.

The fallacy that lurks in this argument consists in transferring to the interpretation of the term "borrow money" a strictness of construction that does not belong there,—that belongs only to a determination of the objects for which money may be borrowed. The expression, "for general purposes," may properly enough be

¹ *Hill v. Memphis*, 134 U. S. 203.

restricted within such limits as the courts shall deem to be required for the protection of the taxpayer ; but there is really no good reason for disturbing settled rules of construction, and depriving the term "to borrow money" of its ordinary and usual meaning.

If the court seeks to discover what the Legislature of Texas, in 1873, meant when it conferred the chartered power upon the city of Brenham to borrow money for general purposes,¹ there would seem to be two obvious replies to such inquiry.

First. It meant to give the right to borrow money by the usual and customary methods that were prevailing among municipal corporations at that period in the State of Texas.

Second. By providing, in the very Act creating the charter, that the bonds of the city of Brenham should not be subject to tax, the Legislature clearly indicated a purpose to clothe the city with authority to issue a negotiable bond, should it at a future day become necessary so to do in the exercise of its power to borrow money.

The pernicious results that are sure to attend this abrogation by a majority of the justices of the Supreme Court of a long-established rule of property, it is not easy to estimate. It falls with severity upon many prudent holders, who had a right to regard the settled construction as incapable of reversal. But this is by no means all. It will serve to beget a desire for repudiation in communities otherwise disposed promptly to pay their honest debts. It will give a pretence to unscrupulous leaders to foment discontent at the administration of municipal finances, and thus tend to precipitate disturbances that will inevitably injure to a serious degree the credit of their respective localities. It creates distrust, and imparts a shock to a class of securities in which a large number of persons of moderate means are vitally interested. Finally, with no corresponding advantage gained, it stigmatizes the Supreme Court of thirty years ago, and of succeeding years, as having been mistaken upon a plain point of law, and does so for reasons which to the minds of many of the Bar are wholly inadequate and radically unsound.

¹What did the phrase "to borrow money" mean in 1873, when Brenham took her charter? That is the sole inquiry. Did the Legislature and the city unite in a mutual understanding of its meaning? What the justices to-day may think such a term ought to mean, as a question *de novo*, is interesting ; but in 1873 there was no divergence of opinion upon this point. It simply meant power to obtain money in the method then everywhere resorted to by municipal corporations having occasion to borrow.

The foregoing observations, we may say by way of postscript, had assumed their present form with no opportunity on our part to learn what were the views of the dissenting members of the court. Now that the opinion of Mr. Justice Harlan — concurred in by Messrs. Justices Brewer and Brown — is printed, we feel compelled, for lack of space, to content ourselves with only the briefest reference to what is there ably and convincingly put.

Mr. Justice Harlan controverts the statement of the majority of the court that *Rogers v. Burlington* has been overruled by later adjudications: —

“We cannot give our assent to the doctrine announced in the present case, nor — we submit with some confidence — is that doctrine sustained by any decision of this court which has been cited.”

The opinion then takes up the decisions cited by Mr. Justice Blatchford, and points out that in no one of them was a question raised as to negotiable securities being issued under an express power to borrow money.

Inasmuch as Mr. Justice Harlan united with his brethren in deciding *Merrill v. Monticello*, it is interesting to note how he disposes of the conclusions of the court in that case. We quote as follows: —

“The case which seems to be much relied on to support the present judgment is *Merrill v. Monticello*; but we submit that it does not sustain the broad doctrine that negotiable securities may not be issued in execution of an *express* power to *borrow money*. What could or could not be done under such a power was not a question involved in that case. The question was whether authority in the town of Monticello to issue negotiable bonds could be *implied*, not from an express but from an *implied* power to borrow money. After observing that, under the laws of Indiana, the proposition that a town has an *implied* authority to borrow money, or contract a loan, under the conditions and in the manner expressly prescribed, was not to be controverted, the court, speaking by Mr. Justice Lamar, said: ‘But this only brings us back to the question, Does the *implied* power to *borrow* money or contract a loan carry with it a *further implication* of power to issue negotiable bonds for that amount, and sell them in open market?’

“The question in that case, as framed by the court, clearly shows that it was only considering whether an authority in a municipal corporation to issue negotiable securities could be *implied* from a power to borrow which was *itself* to be *implied* from other powers granted. This also appears from the following clause in the opinion: ‘It is admitted that

the power to *borrow* money, or to incur indebtedness, *carries with it* the power to issue *the usual evidences of indebtedness*, by the corporation, to the lender or other creditor. Such evidences may be in the form of *promissory notes, warrants, and, perhaps, most generally, in that of a bond.* And it is further shown by the fact that the opinion, referring to the clause in *Police Jury v. Britton*, above quoted, which states that authority in a municipal corporation to issue negotiable securities may be implied from an *express* power to *borrow* money, states that it has no application to the case then before the court, in which the attempt was made to *imply* authority to issue negotiable bonds simply from an *implied* power to *borrow money.*"

This explanation, we may be permitted to say, strikes us as not particularly happy. That decision, it is true, does not deal with the meaning of an express power to borrow money; but Mr. Justice Lamar's opinion, in unmistakable terms, assumes to point out and to dwell upon a distinction between a power to borrow money and a power to issue negotiable securities. As stated in our former article, we fail to perceive the difference, in the logical consequences involved, between an implied power, once legally established, and a power created in express terms, to borrow money.

Mr. Justice Harlan cites *City of Savannah v. Kelly*,¹ as very much in point; and quotes with approval from Judge Dillon as follows:

"*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, — as, for example, subscriptions to aid railways and other public improvements, — will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability."²

The provision in the Brenham charter that *bonds* shall not be subject to tax, is referred to as justifying the application of the rule laid down by Dillon. The opinion closes with the following emphatic protest:—

"It seems to us that the court, in the present case, announces for the first time that an express power in a municipal corporation to borrow money, for corporate or general purposes, does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such

¹ 108 U. S. 184.

² 1 Municipal Corporations, 4th ed., § 125.

note or bond is void in the hands of a *bona-fide* holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created,—which is the mode usually adopted in such cases,—the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds, executed by municipal corporations for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be enormous. A declaration by this court that such notes and bonds are void, because of the absence of *express* legislative authority to execute *negotiable* instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion."

It may fairly be assumed that the profession will not be disposed to suffer a doctrine of this wide application, upheld as it is by five justices in the face of a dissent so vigorous, to pass unchallenged. When a vacancy in the court shall no longer exist, it will be well if the question can be brought before a full bench of nine justices, in a form fitted for a most careful review of the whole subject. Whatever may be the conclusion then reached it is to be hoped that it will be supported by a process of reasoning that can leave no room to question its logical soundness.

Frank W. Hackett.

WASHINGTON, D. C.

LEGISLATIVE CONTROL OVER CONTRACTS OF EMPLOYMENT: THE WEAVERS' FINES BILL.

THE Legislature of Massachusetts during the session of 1891 passed an Act popularly known as the "Weavers' Fines Bill."¹ The first section of this Act is as follows:—

"No employer shall impose a fine upon or withhold the wages or any part of the wages of an employé engaged at weaving, for imperfections that may arise during the process of weaving."

The second section provides penalties for violations.

The constitutionality of the Act has recently been tested in the case of *Commonwealth v. Perry*.² The defendant, a manufacturer under indictment for a violation of the Statute, was found guilty in the lower court; but his exceptions taken at the trial have been sustained in the Supreme Court, on the ground that the Legislature had no power to pass the Statute in question.

Two other States, Ohio and Illinois, have laws similar to the Weavers' Fines Bill.³ These laws, however, are more general in their terms, and apply to all employers of workmen, the class of weavers not being the object of special protection. They have come into existence within a few months, and have not yet been discussed in the courts. The case of *Commonwealth v. Perry* is the first of its kind, and the decision, having been rendered by a

¹ Stat. 1891, c. 125.

² 28 N. E. Rep. 1126, Dec., 1891.

³ Statute of Ohio, approved April 29, 1891, contains the following clause: "Whoever, without an express contract with his employé, deducts or retains the wages, or any part of the wages, of such employé for ware, tools, or machinery destroyed or damaged, shall be liable" both in penalties specified and in civil action brought by the party aggrieved.

Statute of Illinois, approved May 28, 1891, in section 3, declares it to be "unlawful for any person, company, corporation, or association employing workmen in this State to make deductions from the wages of his, its, or their workmen, except for lawful money, checks, or drafts actually advanced without discount, and except such sums as may be agreed upon between employer and employé which may be deducted for hospital or relief fund for sick or injured employés." Section 4 provides that any deductions from wages may be recovered in appropriate action, and no off-set or counter-claim of any kind shall be allowed. Section 5 provides penalties for violations and evasions.

court of great authority, will undoubtedly stand as a precedent. The Statutes, moreover, belong to a class of legislation which has come into great prominence within the last few years; namely, legislation designed to adjust the relations of working-men to their employers by regulating the manner of employment, the hours of labor, and the payment of wages. It cannot be uninteresting, therefore, to examine the rule of constitutional law applied to defeat the Massachusetts Statute.

Let us briefly summarize the argument of the court. After stating that weaving is done in pursuance of a contract between employer and employé, and that imperfect weaving may often be due to negligence or want of skill on the part of the employé, the court proceeds to say that the object of the Statute is to forbid the withholding of any part of the contract price for non-performance of the contract, and to compel payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done, the only remedy left to the employer being the valueless one of a suit for damages.

Among the fundamental rights secured by the Declaration of Rights of Massachusetts, the court refer to the right of acquiring, possessing, and protecting property,¹ and hold that within this right is included the right to make reasonable contracts under the protection of the law. Attention is also called to the clause of the Federal Constitution forbidding the States to pass laws impairing the obligation of contracts.² Now, in the opinion of the court, the Weavers' Fines Bill may have either of two interpretations: (*a*), it may be held to permit a manufacturer to hire weavers, and to agree to pay a certain price for work done with care and skill, at the same time placing the employer under penalty to pay the price, though there may be failure of performance on the part of the employé; or (*b*), it may be held to permit the hiring of weavers only upon terms that the price for good work shall be paid, no matter how badly the work may be done. The Statute is unconstitutional under either interpretation: under (*a*), because it renders the contract of no effect, the essential element being that full payment shall not be made until there has been full performance; under (*b*), because it is an interference with the right to make proper and reasonable contracts in conducting a legitimate business.

¹ Constitution, Massachusetts, Declaration of Rights, art. i.

² Constitution, United States, art. i. § 10.

A dissenting opinion, briefer than we might have desired, in view of the importance of the principles involved, was delivered by Judge Holmes. His points are as follows: (1) A Statute cannot impair the obligation of a contract made after the Statute went into effect; (2) this Statute does not interfere with the right of acquiring, possessing, and protecting property more than laws against usury and gaming; (3) though it may be urged that the power to make reasonable laws impliedly prohibits the making of unreasonable laws, yet legislation should not be overturned on this ground, "unless there is no room for honest difference of opinion;" (4) if the Statute is regarded as putting an end to *quantum meruit* and recoupment for defective quality not amounting to failure of consideration, it puts an end to innovations in the common law, and there is no objection to doing so; (5) if the Statute was passed with a view to prevent cheating of workmen by a pretence of imperfect work, it cannot be declared void as based on a false assumption made by the Legislature. It is as if in the view of the Legislature an honest tool were taken away from the employer because it was used dishonestly.

That the right of the citizen to carry on a lawful business, and to make all contracts necessary for that purpose, is included in the right of acquiring and possessing property, is generally admitted. At the same time it must also be admitted that the right is not an absolute one, and that it is subject to the same limitations as rights of property in general. The nature and extent of these limitations has been discussed in a great number of cases, to some of which we shall have occasion to refer. In the dissenting opinion of Judge Holmes, we find suggested one of the limitations on the right of the citizen to be protected in his property. Judge Holmes does not use or define the phrase "police power;" yet it is a proper inference that in his view the Weavers' Fines Bill is to be classified as an exercise of the police power by the Legislature. The existence of this power is ignored in the prevailing opinion. If the Statute can be sustained, it is only as a legitimate exercise of the police power. It is necessary, therefore, to discover what is meant when that power is mentioned.

This is not the place for an extended review of the cases which have sustained the right of the Legislature to exercise the police power, and which show the almost infinite variety of senses in which the phrase "police power" may be used. We may leave unnoticed health and quarantine laws, and proceed at once to a class of cases much nearer *Commonwealth v. Perry*.

Perhaps the most widely quoted exposition of the police power in its relation to property rights is that given by Chief Justice Shaw in *Commonwealth v. Alger*.¹ It is there said that "rights of property, like all other social and conventional rights, are subject to such limitations in their enjoyment as shall prevent them from becoming injurious, and to such reasonable restraints and regulations established by law as the Legislature under the governing and controlling power vested in them by the Constitution may think necessary and expedient." In *Munn v. Illinois*,² Justice Field, speaking of the police power, says: "Whatever affects the peace, good order, morals, and health of the community, comes within its scope, and every one must use and enjoy his property subject to the restrictions which such legislation imposes."

Many Statutes have been enacted to regulate what are called "dangerous" occupations and businesses "affected with a public interest." In *Thorp v. Railway Co.*³ a law requiring railway companies to maintain cattle-guards at crossings, and making the companies liable for all damages until the law shall be complied with, was declared to be a proper regulation for the prevention of harm to the community. Judge Redfield remarked that the police power in one sense means the power to regulate rights of any persons so as to subserve the rights of all others. A similar case is that of *Railway Co. v. Richmond*,⁴ where the Supreme Court of the United States upheld an ordinance regulating the manner of propulsion of cars in the city of Richmond, notwithstanding charter privileges held by the company.

Though the case of *Munn v. Illinois*⁵ is very familiar, we cannot pass over it without a further reference. There a Statute fixing maximum rates to be charged by owners of grain elevators in the city of Chicago was questioned, but was declared constitutional. The language of the court is as broad as possible. In dealing with the clause in the Bill of Rights that no person shall be deprived of property without due process of law, it is said that this has never been construed by the courts of any State so as to deny the legislative power to make all needful rules respecting the use and enjoyment of property. Familiar instances of the unquestioned exercise of this power are found in laws regulating ferries and mills, fixing compensation in shape of tolls, fixing value of the use

¹ 7 Cushing, 53.

² 94 U. S. 113.

³ 27 Vt. 140.

⁴ 96 U. S. 521.

⁵ 94 U. S. 113. Vid. *People v. Budd*, 22 N. E. Rep. 670 (N. Y.).

of money, and giving municipal bodies power to regulate the charges of hackmen, and the weight and price of bread. The Constitution, it is held, is not infringed by a law regulating business, which may render property used to carry on the business less valuable. This case and the Granger cases in general sustain the right of the Legislature to interfere between persons engaged in certain lines of business and people who deal with them, in order to settle conflicting interests. The question suggested is, When does a particular business become affected with a public interest?

We approach nearer the case under consideration in taking up the "Mill Acts" and the Acts permitting the draining of swamp-lands in spite of objection on the part of the owners of some of the land. In *Head v. Amoskeag Co.*¹ the questions arose upon petition by the company, whether the construction of the company's dams and mills and the flowing of Head's lands under authority given by the Mill Acts of New Hampshire were of benefit to the people, and whether by such flowing, Head's property was taken without due process of law and in violation of the right to acquire and hold property. The decision answered the first question in the affirmative, the second in the negative. Justice Gray said that it was unnecessary to decide whether the taking of land under the Mill Acts is a taking under the right of eminent domain; but such a Statute, considered as regulating the manner in which the rights of proprietors of land adjacent to a stream may be asserted and enjoyed, with a due regard to the rights of all and to the public good, is within the constitutional power of the Legislature. In other words, the Legislature may, for the public good, provide for the settlement of adverse claims,—that is, may settle people's quarrels for them by regulating the manner in which property rights may be enjoyed.

The case of *Wurts v. Hoagland*² decided that a Statute of New Jersey which provided for the drainage of any low or marshy land within the State, upon proceedings instituted by at least five owners of separate lots of land included in the tract and not objected to by the owners of the greater part of the tract, was valid, without reference to the right of eminent domain. The opinion in the case seems to imply that the draining of these lands, though held by private citizens, who would reap the benefit primarily, was a matter of sufficient public concern to justify an exercise of the police power.

¹ 113 U. S. 9.

² 114 U. S. 606.

The laws against the manufacture and sale of oleomargarine are among those whose effect has been to restrict the right of the citizen to enter into any lawful business, and to make contracts in carrying on such business. The Missouri Court of Appeals, in *State v. Addington*,¹ in reviewing a conviction under a Statute forbidding the manufacture of oleomargarine, said that the Declaration of Rights does not mean "that all persons have an absolute right to life and property, and to the enjoyment of the gains of their own industry. On the contrary, each of the enumerated rights is held in subordination to the rights of society." The situation was summed up as follows: "A practice has sprung up which operates to defraud the people of their right of choice as to what they will eat, with reference to an article of food of constant and universal consumption. The Legislature has passed an Act which, if properly administered, will nip the practice in the bud. The courts must uphold and administer this Act as a valid exercise of the police power."

In *People v. Marx*,² the Supreme Court of New York declared an Oleomargarine Act unconstitutional; but in *People v. Aronsonberg*,³ a later Statute, applying to the same article, was sustained, on the ground that while the previous Statute was aimed at every article designed to *take the place* of dairy butter, this Statute was aimed simply at articles designed to be *imitations* of butter, and calculated to deceive; hence, in the view of the court, the later Statute was constitutional, as an attempt to prevent fraud. The Legislature has power to enact such laws as it may deem necessary to prevent the simulated article being put on the market in such form or manner as may be calculated to deceive. In *Powell v. Pennsylvania*,⁴ the Supreme Court of the United States refused to overrule a decision of the Pennsylvania court upholding an oleomargarine law, the reason given being that it could not be adjudged that Powell's rights had been infringed by the Statute without holding that although it may have been enacted in good faith for the protection of public health, it had in fact no real or substantial relation to those objects.

An interesting class of cases in the South have dealt with laws prohibiting within specified districts the sale or the transportation

¹ 12 Mo. App. 214 (1884).

² 99 N. Y. 377.

³ 105 N. Y. 123. Vid. *Palmer v. State*, 39 Ohio St. 236, 238 (1883).

⁴ 127 U. S. 678.

by night of cotton in the seed. *Mangan v. State*,¹ approving *Davis v. State*,² declared such laws to be constitutional. *Commonwealth v. Alger* and *Munn v. Illinois* were relied upon by the court. Quoting from the earlier case in the same State, it was said that "the primary object of this law is not to interfere with the rights of property or its vendible character. Its object is to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor, and destroy the legitimate profits of agricultural pursuits, at least within the specified territory; . . . the necessity for such legislation, its propriety, justice, and wisdom, being a matter for legislative determination." A law of the same character was sustained by the North Carolina court in *State v. Moore*.³ It was held to be a legitimate exercise of the police power in line with *Commonwealth v. Alger*, *Thorp v. Railway Co.*, and other similar cases which have not been mentioned.⁴ Its object was "to protect planters by withdrawing the temptations offered to dishonest men to take from their fields, store-houses, or gin-houses, a valuable product that is so difficult to identify and reclaim, and to sell it to dealers under cover of the darkness."

Let us now glance at the situation in Massachusetts which led to the passage of the Weavers' Fines Bill. There were two classes of people in the community, whose interests in some respects were mutual, in others, antagonistic. On the one hand were the manufacturers; on the other, their employés,—the weavers. The position of the former was by far the stronger, because they controlled the money supplies upon which the latter depended for existence. The manufacturers had the power to punish their employés by levying fines, or, what is the same thing, by withholding wages. This power was of a nature to permit great abuse. It is true that imperfect work was often returned by the weavers. In many cases the imperfections were due to negligence and lack of skill; in many others, they were due to causes over which the weavers had no control. The injustice of the practice of withholding wages lay in

¹ 76 Ala. 60 (1884); Laws of Sess. 1878-79, p. 206.

² 68 Ala. 58.

³ Laws of North Carolina, 1887, c. 81, amended by Law of 1889, c. 187, 219; 104 N. C. 714 (1889).

⁴ *Butcher, &c. Co. v. Crescent, &c. Co.*, 111 U. S. 46; *Beer Co. v. Massachusetts* 97 U. S. 25; *State v. Mugler*, 29 Kan. 259.

the fact that often no distinction was made between the two sources of imperfect work. The workmen were not in a position to compel an observance of the distinction, and they insisted that the law should protect their interests.

Here there was a standing quarrel to be settled. It seemed necessary to place the two classes on a more equal footing. For this purpose the police power of the State was invoked. It was enacted that the employer should not use his position to the weavers' disadvantage, just as in the Drainage Acts it was declared that one owner of land should not, by withholding his consent to the proposed improvement, injure the interests of adjacent owners, and as in the Mill Acts it was declared that owners of land on streams should not delay industry by refusing to submit to flowage. In establishing the constitutionality of these Acts, it was argued that the public interest was conserved by the settlement of such controversies. Is not the public welfare just as much conserved by the settlement of quarrels between employer and employé? Are not public improvements and industry equally advanced? The object in all these cases seem to be exactly the same. The police power seems to be rightly exercised in all of them.

As to the scope of the Weavers' Bill, we note that the industry itself was not interfered with. Contracts for weaving were just as possible after as before the Statute; in fact, the operation of the Statute has been to some extent evaded by contracts for piece-work. The employer still had it in his power to select workmen best fitted for the peculiar industry, and to provide rigid superintendence. As Judge Holmes suggests, the effect of the law was to take away certain remedies, leaving the employer his action on the contract. The Legislature declared it to be expedient and necessary for the prevention of certain evils, and for the protection of industry, that limitations should be placed on the right of employers of weavers to introduce, expressly or impliedly, certain conditions into their contracts. The reasoning in the cotton-seed cases cited above, applies almost strictly to *Commonwealth v. Perry*. Strangely enough, the language of *Commonwealth v. Alger*, relied on in North Carolina and Alabama to sustain extensions of the police power, is not followed in the State in which it was used.

The majority of the court cited a number of cases in support of the opinion, and to these we must now turn. One of them is *God-charles v. Wiseman*,¹ decided in Pennsylvania in 1886. It was held

¹ 113 Pa. St. 431.

that a Statute passed in 1881,¹ forbidding employers to give "store orders" in payment of wages, was invalid. Gordon, J., said: "An attempt has been made by the Legislature to do what, in this country, cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The Act is an infringement alike of the right of the employer and employé; more than this, it is an insulting attempt to put the laborers under a legislative tutelage which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." The Statute is disposed of in this summary manner, without citation of authorities and without consideration of the immense scope of the police power of the Legislature.

The second of the cases cited is more satisfactory as a statement of the view opposed to that of the writer. In *State v. Goodwill*,² a Statute of West Virginia,³ which prohibited the issue, for payment of wages by persons engaged in mining and manufacturing, of any order or paper except such as specified in the Statute, was held to be invalid. Referring to the Fourteenth Amendment to the Constitution of the United States, and to the Bill of Rights of West Virginia, declaring the inviolability of property, the court asked: "Can the Legislature, in view of these constitutional guarantees, limit or forbid the right of contract between parties under no mental, corporal, or other disability, when the subject of the contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties?" The principle of the decision is, that "a person living under the protection of this government has the right to adopt and follow any lawful pursuit, not injurious to the country, which he may see fit. And as an incident to this is the right to labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts," etc.

The court distinguished this Statute from the Statutes relating to railways, elevators, water-mills, and hackmen, on the ground that in the latter the public interest was protected. Strong language was used as to the impolicy of permitting such legislation as the Act in question to go unchallenged. As before remarked, a distinction of this kind seems strained. In every case, in the "Store-order" Acts, as well as in the others mentioned, conflicts between certain classes in the community seemed dangerous to the State; the public in-

¹ Act of June 29, 1881 P. L. 147.

² 33 W. Va. 179 (1889)

³ Stat. 1887, c. 63.

terest was that private interests should be reconciled. The distinction attempted was not proved, and was therefore a begging of the whole question.

In *State v. Coal and Coke Co.*¹ another section of the same Statute which forbade employers to sell to their employes merchandise and supplies at a greater profit than to persons not employed by them, was held unconstitutional for the same reasons. The remedy, it was stated, was in the hands of the employé.

A third case cited is that of *Millitt v. People*;² the distinction already criticised is again made, and the rights of the laborer are similarly described as in the cases just noted. The defendant was indicted for failure to obey a Statute of Illinois³ which required all owners of coal mines to furnish a track scale upon which to weigh coal lifted from the mines, and which provided that all contracts for the mining of coal in which the weighing of the coal as required in the Statute should be dispensed with, should be null and void. The defendant was discharged, on the ground that there was nothing in the condition of the laborer in mines to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining that price.⁴

Judge Holmes cites the case of *Hancock v. Yaden*,⁵ decided in Indiana in the same month as *State v. Goodwill*. The plaintiff in this case demanded payment in United States money for services as workman in the defendant's mine. The latter set up a written contract whereby the plaintiff agreed to accept payment in goods and merchandise at the defendant's store, and waived his right to payment in money. The question was whether this contract was valid, a Statute of Indiana forbidding the making of such contracts between employers and employes engaged in coal mining. The court said: "The right to contract is not and never has been in any country where, as in ours, the common law prevails and con-

¹ 33 W. Va. 188 (1889).

² 117 Ill. 294 (1886).

³ Laws of 1885, p. 221.

⁴ The court in *Commonwealth v. Perry* also cite *People v. Marx*, 99 N. Y. 377; *In re Jacobs*, 98 N. Y. 98, where a law forbidding the manufacture of cigars in tenement houses was held unconstitutional, on the ground that while it was ostensibly a health law, it was not in fact of such a character; *People v. Gillson*, 109 N. Y. 389, a case denying the validity of an Act restraining the giving of prizes in connection with the sales of merchandise. See also *Ex parte Kubeck*, 85 Cal. 274: an eight-hour ordinance of the city of Los Angeles held unconstitutional, as an infringement of the right to make and enforce contracts.

⁵ 121 Ind. 366.

stitutes the source of all civil law, entirely beyond legislative control." Numerous instances of legislative control of contracts are mentioned. "It cannot be denied, without repudiating all authority, that the Legislature does possess some power over the right to contract; and if it does, then nothing can be clearer than that this power extends far enough to uphold a Statute providing that payment of wages shall be made in money, where there is no agreement to the contrary after the services have been rendered." It is denied that this is class legislation; it operates on all who are similarly situated, and neither confers special privileges nor makes unjust discrimination.¹

As an additional authority, we may refer to the case of *Weil v. State*.² A Statute of Ohio³ made it unlawful for the vendor of personal property, sold on the condition that the title should remain in him until payment in full had been made, to take possession of such property without tendering or refunding to the purchaser the sums already paid by him. This was held a constitutional enactment. The decision was that the Legislature simply established an equitable rule for an adjustment of claims of parties to such a contract. The oppression and hardship which grew into the contracts formerly allowed, whereby the vendee forfeited not only the property, but also the instalments of the purchase price paid by him, were remedied. The defendant was at liberty to enter into a contract of this kind or not, but having once entered, the Statute was binding upon him. This case is closely analogous to *Commonwealth v. Perry*.⁴

It is thus seen that the authorities are divided on the question whether the police power should be extended to uphold a Statute like that of the Weavers' Fines Bill. It must be remembered that a wide discretion rests in the Legislature. The constitutional provisions protecting the right to enjoy property are not in any sense superior to the legislative right to use the police power for the public benefit. An ostensible exercise of the power which in reality cannot be sustained *from any point of view* as legitimately within

¹ *Johns v. State*, 78 Ind. 332; *McAnnich v. Miss. R. R. Co.*, 20 Ia. 338.

² 40 Ohio St. 450 (1889).

³ Stat. May 24, 1885.

⁴ For other interesting cases where property rights were held to be constitutionally regulated by use of the police power, see *Bertholf v. O'Reilly*, 74 N. Y. 509; *Prentiss v. Weston*, 111 N. Y. 460; *Hawthorn v. People*, 109 Ill. 30; *Commonwealth v. Morningstar*, 22 Atl. Rep. 867; *Commonwealth v. Barrett*, 17 S. W. Rep. 336.

that power is undoubtedly invalid;¹ but if there is any doubt, however slight, that doubt must be resolved in favor of the Legislature. That is, if from any point of view there is justification for legislative interference for the interests of the public, and if the means adopted are appropriate to the end, there is no conflict with the constitutional guarantees protecting private property, though the legislation may restrict property rights. The courts at times lose sight of the force of this principle; *e. g.*, in *State v. Goodwill*, where much of the language used is not in point, because dealing with the Statute there under examination as a matter of public policy. Public policy cannot enter into consideration in the determination of the constitutionality of an Act of the Legislature. That the Statute assumes that the employer is at times dishonest, and the employé at times an imbecile, is a political question to be discussed in the Legislature. The caution required of the court in reviewing legislation has been stated in numerous cases.²

The Weavers' Fines Bill in effect simply modified the remedies secured to the employer under his contracts for weaving. The only constitutional restraint upon changes in remedies seems to be this, that no remedies under contracts existing at the time of the passage of the Statute can be taken away, if by so doing the obligation of the contracts is substantially impaired. A party to a contract has a vested right in the contract, and if the law is afterwards so changed that the means of legally enforcing the contract are materially impaired, the obligation no longer remains the same. Such a change in the laws violates the Federal Constitution.³ The Constitution, however, does not guarantee that future contracts shall be enforced by existing remedies. It does not forbid the passing of laws which restrict the operation of future contracts. A rule of law allowing certain remedies is like any other rule of law. It is subject to amendment or repeal, and all such changes

¹ *In re Jacobs*, 98 N. Y. 98.

² The presumption is always in favor of the validity of the Statute. *Hawthorn v. People*, 109 Ill. 302; Chief Justice Shaw in *Wellington et al.*, Petitioners, etc., 16 Pick. 95; *Lehman v. McBride*, 15 Ohio St. 573; *Matter of Gilbert Elevated Railway Co.*, 70 N. Y. 361; *People v. Albertson*, 55 N. Y. 50; *Mossman v. Higginson*, 4 Dallas, 12.

The Legislature must be the sole judge of the necessity of action. Harshness of the measures adopted has no effect on the question of power. *Bancroft v. City of Cambridge*, 126 Mass. 438; *Eastman v. State*, 109 Ind. 278; *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512; *Powell v. Pennsylvania*, 127 U. S. 678.

³ *Knight v. Dorr*, 19 Pick. 48; *Edwards v. Johnson*, 105 Ind. 594; *Green v. Biddle*, 8 Wheat. 84; *Curran v. State*, 15 How. 304; *Goodale v. Fennell*, 27 Ohio St. 432; *Wynehamer v. People*, 13, N. Y. 399.

are valid if they are made to operate *in futuro*. They are even valid retrospectively if they do not interfere with vested rights.¹

In the opinion of the court, the remedy left to employers of weavers is not one of practical value. While that consideration, admitting it to be true, would have been pertinent in a case involving a contract made before the passing of the Statute, it does not seem to be so in discussing a Statute wholly prospective in its operation, and passed by the Legislature in the exercise of its police power. An employer is given sufficient notice of his rights under the contracts he may make. It would be absurd to say that he has a vested right in the remedies he may gain, provided he enters into contracts with his employes. The Statute must be read into each contract; it is as much a part of the contract as if expressly included.² Bankruptcy laws are upheld on this ground. They limit the rights of creditors, and declare that certain formalities shall operate to discharge the debtor and put an end to his liability. The creditor cannot complain, since the laws give him full notice of the limitations upon his rights under his contracts.³

In view of these well-settled doctrines, it is somewhat surprising that any reference to the clause forbidding the impairment of contracts should have crept into the opinion of the court in *Commonwealth v. Perry*. The Weavers' Fines Bill had nothing to do with existing contracts, and could not impair obligations arising from them.

Herbert Henry Darling.

Boston, January, 1891.

¹ *Commonwealth v. Commissioners*, 6 Pick. 501; *Sampeyreal v. United States*, 7 Pet. 222; *Butterfield v. Rudde*, 58 N. Y. 489; *Richardson v. Akin*, 87 Ill. 133; *Read v. Bank*, 23 Me. 318.

State Legislatures have unquestionably the right to pass laws which operate to control and modify the express or implied provisions of contracts. *James v. Stull*, 9 Barb. 482; *Aycock v. Martin*, 37 Ga. 124.

² *Smith v. Parsons*, 1 Ohio, 236.242; *Jewell v. Railway Co.*, 34 Ohio St. 601; *Brine v. Insurance Co.*, 96 U. S. 627; *Weil v. State*, 46 Ohio St. 450; *Railroad Co. v. McClure*, 10 Wall. 511; *Long v. Straus*, 107 Ind. 94.

³ *Bigelow v. Pritchard*, 21 Pick. 169; *Blanchard v. Russell*, 13 Mass. 1. 19; *Wheelock v. Leonard*, 20 Penn. St. 440; *Eckstein v. Shoemaker*, 3 Wheat. 15.

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THE LAW SCHOOL. — Readers of Professor Langdell's last Annual Report are familiar with the fact that the resources of the Law School have been strained — in reading-room, lecture-rooms, and library alike — by its recent growth. The question has become a very pressing one, how to deal with the further increase next year. Such an increase is reasonably certain. Of the second-year class of 1890-91, 66 per cent returned in 1891-92 to complete their course. If the same ratio — an unusually low one — holds, the third-year class 1892-93 will be larger than the present one by twenty-seven. The present second year class is now stronger by eleven than when it entered the School. If the present first-year, instead of gaining eleven, loses the same number, the second-year in 1892-93 will still show an increase of twenty-nine. The entering class will probably not surpass the record. But assuming that the first-year men and special students remained stationary, — the latter an improbable assumption, for reasons that appear below, — the School would nevertheless show a net increase, at the very least, of more than fifty. The total will rise above four hundred. The necessity of taking vigorous steps to meet this emergency, for an emergency it really is, has been self-evident. Almost all the changes announced for the coming year are referable to this cause.

In the first place, the facilities of the reading-room, as regards both seating capacity and the distribution of books, will be enlarged. For the latter purpose, an opening will be made into the stack on the side opposite the present desk, and a second and larger delivery desk will be established. The problem of finding extra seats is more difficult. Already this year, during the Christmas recess, five new tables have been put in the reading-room, in addition to the original twelve. This fills the main room; further crowding is physically impossible. The only resource left is the vacant space to the east of the stack, adjoining the new delivery desk. When the ceiling is knocked out, and light admitted from above, three tables, with seats for forty men, can be placed here. There will then be accommodations for about two hundred and fifty men in all. This is the utmost that can be done in preparation for next year.

It is undoubtedly with a view to delaying further increase that the Faculty have again made admission more difficult, in two ways. Beginning with the autumn of 1893, no one will be received as a special student without passing the same entrance examination which is set for candidates for regular admission. Whether or not the Faculty formally abolishes the category of special students after that date, seems immaterial; for no conceivable motive will exist why any man should desire to be one. In order to realize how great a change this is from the not distant past, when half the "Law School Specials" were men who found the College too hot for them, one need only refer to the Harvard Catalogue for any year before 1890-91. The certificate of a good moral character at the outset, and the payment of a *quid pro quo*, were the only requisites three years ago, either to entering or to staying.

In addition to this change, the admission requirements themselves, alike for specials and regular students, are increased. Instead of offering Blackstone, and Latin *or* easy French at sight, candidates after 1892 must pass in Blackstone, and both Latin *and* French. The prospective raising of the bars will undoubtedly tend to increase the number who will try the examinations or enter as special students next fall.

The most important change, however, because the one most likely to affect the life of the School, is the division of the first-year class into sections in all its work except Criminal Law. This step, of course, involves the strengthening of the permanent teaching force. Accordingly, a new full professor has been added to the Faculty; and Mr. Beale, who, as instructor, has taught this year only four hours a week, is promoted to be assistant-professor, and will do full work. Professor Smith, in Torts, will keep both sections of the class; Property will be divided between Professors Gray and Beale, and Pleading and Contracts between Professors Wambaugh and Williston.

The new system will evidently introduce perplexities of a kind with which the School has been unfamiliar. How, for example, will the assignment of students to a section whose hour is unpopular be enforced? But at all events the present system would soon have become not only inconvenient, but impossible. In classes above a certain size, discussion is either stifled or left in the hands of a very few, to the infinite prejudice of the remainder.

A word in regard to the new members of the Faculty may be of interest. Assistant-Professor Beale graduated from the College in 1882, and from the Law School in 1887, — being while there, it may be added, one of the founders of the *LAW REVIEW*. After graduation, he co-operated with the author in preparing for the press the last edition of Sedgwick on Damages. This fact led, in 1890-91, to an invitation to deliver a course of lectures on Damages in the Law School, and the same spring he was appointed an instructor for the year now closing. Professor Wambaugh graduated from Harvard College in 1876. He received the degree of A.M. in 1877, and that of L.L.B. — the latter with very high distinction — in 1880, being a member of the first class that took the three years' course. For several years he practised in Cincinnati, at the same time teaching in the Cincinnati Law School. About three years ago he was called to a professorship in the Law School of the State University of Iowa, where he has since remained.

There will be no change next year in the optional work offered,¹ — the course on Massachusetts Law and Practice, and ten lectures on Patent Law. In text-books, however, there will be several welcome changes. The class in Evidence will use Professor Thayer's new collection of cases. Ultimately, it is to be hoped, Professor Smith will perform the same service for the course in Corporations; but at present his time is occupied by the preparation of "Cases on Torts," to be ready year after next, which will supplement or possibly supersede Professor Ames's collection. Meanwhile, however, the class in Corporations will make much use of the book of cases just issued by Professor Cummings of Columbia, which, except that it does not touch Municipal Corporations, follows very closely the course as given at Harvard. Finally, Professor Ames is preparing a revision of his "Cases on Trusts," in two volumes, — substantially a new book.

MUNICIPAL COAL-YARDS UNCONSTITUTIONAL. — In reply to a question from the Legislature of Massachusetts as to whether the Legislature can constitutionally authorize a city or town to buy coal and wood and to sell them to its inhabitants for fuel, five of the justices of the Supreme Court have expressed their opinion that such a law would be unconstitutional. To carry on such a business, they say, money must be raised by taxation; taxation can only be for a public purpose; selling wood and coal to inhabitants is not the sort of thing which the Constitution contemplates as a public service for which taxation may be authorized.

Mr. Justice Holmes, in dissenting from the above opinion, takes the ground that the purpose is no less public in the case of wood and coal than it is in the case of water or gas or electricity or education; and that it is for the Legislature, and not the court, to consider the necessity or expediency of such legislation.

Mr. Justice Barker, also dissenting, simply emphasizes the point that this sort of thing can be done only if it is necessary; but he leaves it to the Legislature to determine that necessity.

The opinion of the dissenting justices is clearly more consistent with that delivered by the justices two years ago, to the effect that the Legislature could authorize cities and towns to sell gas or electric light to their inhabitants,² and is also, it is submitted, correct on principle. It is for the Legislature to judge, within limits, of the exigency, and also of the public nature of the use; and so long as the resulting legislation can reasonably be said to be in a line with what has always been done, there can be no judicial question.

It should be noticed, by the way, that this is not a decision by the Supreme Court, as stated in the newspapers, but an advisory opinion delivered by the justices in response to legislative inquiry.

TRESPASS BY SUBTERRANEAN SQUEEZING. — A recent New Jersey case³ presents a rather novel instance of trespass. The declaration charged

¹ As this number goes to press, a petition to the Faculty is being numerously signed for the establishment of a course in the New York Civil Code. There would be no great reason for surprise if such a course should be in operation when the REVIEW next appears.

² Opinion of Justices, 150 Mass. 592.

³ C. Sigan v. Pennsylvania R. Co., 23 Atl. R. 8ro.

that the defendants wrongfully and injuriously made, on their own land, an embankment so heavy that the downward pressure (two hundred thousand tons), causing an equal lateral pressure, forced earth and gravel, lying below the surface in the defendant's land, into the plaintiff's land, thereby disturbing the surface of the plaintiff's lot, moving his house on to land not his, and cracking its foundation. The defendants justify under their charter, the embankment being properly and carefully built. The court holds that while the charter justifies any public damage from reasonable working of the road, as injury arising from noise, smoke, cinders, vibration, any damage which in its nature is distinctly private is not within their privilege. This decision, that such an embankment is not within the legislative sanction, which on the facts stated seems open to doubt, leaves the question as though the act had been done by a private individual, and the result of the case is that no man shall squeeze his neighbor's land, even below the surface. To say that a man cannot put buildings of the size he chooses on his own land is at first a startling doctrine; but if the plaintiff can prove actual transfer of particles of earth from his neighbor's lot to his, however far below the surface, it seems to follow necessarily that there is a trespass. Of course, as every downward pressure produces lateral pressure, and pressure is displacement, a man trespasses with every step he takes on his own land. It also follows, that, since the right to support extends only to the land itself, a man is absolutely responsible for all damages to his neighbor's land resulting from building on his own, however firm his land and however loose that of his neighbor. It is needless to add that the unmetaphysical sympathies of juries, as well as the infrequency of violent subterranean displacements, will keep this scientific principle within due limits.

AN OLD LAW FOR THE PROTECTION OF STUDENTS.—Economical students in our vicinity have doubtless been rejoicing over the discovery of a law by which they may at times enjoy the substantial of life at no pecuniary sacrifice. An old Massachusetts Statute, which has practically been unenforced since its enactment, reads that no innholder, tavern-keeper, retailer, confectioner, or keeper of a shop or house for the sale of drink or food, or a livery-stable keeper for horse or carriage hire, shall give credit to a student in an incorporated academy or other educational institution within the State; and in another section, that any one giving credit contrary to this provision shall forfeit a sum equal to twice the amount credited, whether the bill is paid or not. A Harvard student was recently forced, in order to dissolve an attachment for such a debt, to pay the bill. He therefore sued for money paid under duress, and recovered. The case was appealed to the Superior Court, but has since been compromised. Of course the Statute, though absurdly out of date, is not so absolutely inapplicable to the state of society now that, like the Blue Laws, it can be judicially disregarded. It is no more than foolish, and if the Legislature does not take the trouble to repeal it, occasional students will continue to grow slightly fatter from the existence of surroundings that make it impracticable for dealers to refuse all dealings on credit with protected Harvard innocents. It seems on the facts that the appellant had no case, as, if a debt due in honor but not in law is paid under compulsion of law, it is recoverable.

RECENT CASES.

BILLS AND NOTES—SIGNATURE BY OFFICER OF A CORPORATION.—Where nothing appears in the body of a note to indicate who is the maker, and it is signed by a person who affixes to his name an official title as officer of a corporation, the note is *prima facie* that of the person so signing. *Reeve v. First Nat. Bank of Glassboro*, 23 Atl. Rep. 853 (N. J.).

The decision in this case, that a person signing a bill or note *prima facie* incurs a personal liability in spite of an official title affixed to his signature, is opposed in principle to the rule in New York, as shown by the cases in 13 N. Y. 309; 3 Blatch. 431; 44 N. Y. 395.

BONDS, RAILWAY—NOTICE OF TRUST-DEEDS.—Plaintiff held a railway bond, reciting that it was one of a series secured by a trust-deed on property of the railway company, and that it was not obligatory till certified by the trust-company. *Held*, on re-hearing, reversing former opinion, that such general recital did not put *bona fide* holder on inquiry as to existence in the trust-deed of a condition which expressly qualified terms of payment and the right to maintain an action on the bond. *Gulford v. Minneapolis, S. Ste. M. & A. Ry. Co.*, 51 N. W. Rep. 658 (Minn.).

CARRIERS—CONTRACT LIMITING LIABILITY—USE OF SPECIAL CARS.—Shipping contract specified that "plaintiff had examined the car and had found it suitable for the purpose." *Held*, this does not estop the plaintiff from alleging that the car was unsafe. Common carriers cannot limit their liability to the extent of exempting themselves from the consequences of their own negligence, in not having their cars in good condition. The fact that the horse was shipped in a "Palace Horse-Car" owned by a different company, and procured at the special request of the plaintiff, does not relieve the carrier from liability, if it be unsafe. *Louisville & Nashville R. R. v. Dies*, 18 S. W. Rep. 266 (Tenn.).

This is apparently a new ruling in this jurisdiction with regard to freight, though a similar rule has prevailed generally with regard to liability towards passengers carried in cars owned by other companies. 16 Lea, 380; 102 U. S. 457.

CARRIERS—DUTY TO PASSENGER—ASSAULT BY FELLOW PASSENGERS.—*Held*, when a passenger who has been engaged in the eviction of pitmen, having bought his ticket without notice to the company that he was exposed to any particular danger, was assaulted by successive gangs of pitmen crowding into his carriage at successive stations and riding to the next, and the company's servants did nothing to protect the passenger or remove the assailants, that the company was not liable. The court say,—"No obligation is entered into by the railway company with reference to the exceptional and extraordinary circumstances affecting a particular individual." *Pourder v. North Eastern Ry. Co.* [1892], 1 Q. B. 385 (Eng.).

CONSTITUTIONAL LAW—POLICE POWER.—A provision that the entire expenses of a railroad commission "shall be borne by the several corporations owning or operating railroads" within the State, is not in conflict with the Fourteenth Amendment. *Charlotte, C. & A. R. Co. v. Gibbs*, 12 Sup. Ct. Rep. 255.

CONSTITUTIONAL LAW—CRIMINATING TESTIMONY—EVIDENCE.—A State Statute, with the object of abolishing trusts, enacted that the president of each corporation within the State should make answer under oath as to whether that corporation "has merged any of its business with a trust." If such appeared to be the case, both officers and company were made criminally liable. *Held*, that this Statute was in violation of the constitutional provision that "no one shall be compelled to testify against himself in a criminal case." *State v. Simmons Hardware Co.*, 18 S. W. Rep. 1125 (Mo.).

The court relies on *Counselman v. Hitchcock*, 12 Sup. Ct. Rep. 195. The exemption from being compelled to testify, is extended to evidence that could be used in future actions, as well as in present dependent actions.

CONSTITUTIONAL LAW—EVIDENCE—COUNTING QUORUM.—*Held*, (1) that a rule of the House of Representatives that the members present but not voting may be counted in determining the presence of a quorum does not infringe any constitutional right, but is a valid exercise of the power of the House. (2) That the journal of the House is conclusive as to the presence of a quorum, and no evidence can be received to impeach it. *United States v. Ballin*, 12 Sup. Ct. Rep. 507.

The same principle is involved in the second point of this decision as in *Field v. Clark*, 12 Sup. Ct. Rep. 495, *i. e.*, that the fact that a public document is signed and

deposited with its proper custodian, is conclusive of its authenticity, and no outside evidence is receivable to impeach it.

CONSTITUTIONAL LAW—JURISDICTION OF FEDERAL COURTS.—U. S. Rev. Sts. § 5508, make it a crime to conspire to injure any citizen in the exercise of a right secured to him by the Constitution or laws of the United States. The defendants were indicted under this section, they having conspired to kill A, who was in the custody of a United States marshal under a commitment to answer for a crime against the United States. *Held*, that under these circumstances A's right to be protected against lawless violence was a right "secured to him by the Constitution or laws of the United States" within the meaning of the Statute, and that consequently the Federal Courts had jurisdiction of this case. The court distinguishes the *Civil Rights Cases*, 109 U. S. 3; *United States v. Cruikshank*, 92 U. S. 542; and *United States v. Harris*, 106 U. S. 629. Lamar, J., dissents. *Logan v. United States*, 12 Sup. Ct. Rep. 617.

CONSTRUCTIVE TRUSTS—DIRECTOR'S LIABILITY TO COMPANY'S CREDITORS.—The purpose of requiring the ownership of a certain number of shares as a qualification for the office of director, being to assure zeal in the affairs of the company and a careful scrutiny of the same on account of such pecuniary interest, where a director was induced by the promotor of the company to take shares and assume the office through an agreement on the promotor's part to take the shares off his hands at par value at any time, *held*, that to assume and hold the office of director without disclosing this agreement was a breach of confidence against the company. The shares having become practically valueless, and the promotor having taken them off A's hands, in pursuance of the agreement, *held*, that having regard to A's fiduciary position of director, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreement with the promotor, belonged to the assignees of the company. *In re North Australian Territory Co.* [1892], 1 Ch. 322 (Eng.).

Aside from the fact that the agreement was not disclosed, nothing appears in this case showing any fraudulent purpose on the part of the director, or that he did not faithfully perform his duties, or that the company suffered any direct injury. The case can best be put on the broad ground that improper profit made through a fiduciary relation, cannot be retained by the fiduciary.

CONTRACTS—ILLEGALITY—COMBINATION IN RESTRAINT OF TRADE.—A contract made by a corporation with all the manufacturers in the United States of an implement necessary to agriculture, by which for fifty years it is to have power to regulate the price at which they shall sell, and the quantity they shall manufacture, subject only to the condition that its requirements shall be uniform to all manufacturers, is illegal and void. The court will relieve a party to it. *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224 (Supr. Ct.).

CONTRACTS—LIABILITY OF CARRIERS.—On a shipment of goods under a contract of sale, the consignee is entitled to inspect and examine the goods, to ascertain whether they correspond with the invoice, and to a reasonable time to receive and remove them; and during that period the liability of the carrier as a carrier remains undischarged. *McNeal v. Braun*, 23 Atl. Rep. 687 (N. J.).

The doctrine here affirmed is directly *contra* to the Massachusetts doctrine upon the same point.

CONTRACTS—REFUSAL OF THIRD PERSON TO PERFORM CONDITION PRECEDENT.—Though a policy of life insurance requires the production of a certificate of the cause of death from the attending physician as a condition precedent to the right to payment, yet if the physician obstinately and unreasonably refuses a certificate, payment may be enforced without it. *O'Neill v. Mass. Ben. Ass'n*, 18 N. Y. Supp. 22 (Supr. Ct.).

The New York doctrine that, if an architect unreasonably refuses to certify his satisfaction with work done under a building contract which makes his certificate a condition of recovery, there may be recovery without the certificate, is here extended to a case where the person refusing is not an agent of the party to be charged. The contrary rule is illustrated by *Worsley v. Wood*, 6 T. R. 710; *Johnson v. Phoenix Insurance Co.*, 1.2 Mass. 49.

CORPORATIONS—ACCEPTANCE OF CHARTER—INJUNCTION—PLAINTIFF'S STANDING IN COURT.—The Act incorporating a company required that the work necessary to its operation should be commenced within three years, and completed within ten, and these conditions were not satisfied. *Held*, that the company had no legal existence, and that the commencement of the work after the period limited for its completion would be enjoined at the suit of a neighboring private landowner whose property thereby received special injury. *Bonaparte v. Baltimore, H. & L. R. R. Co.*, 23 Atl. Rep. 784 (Md.).

The court was divided on this case, the majority holding that the act of incorporation, in order to be effective, required acceptance by the stockholders of the company, to be manifested by a compliance with the stated conditions; and that, failing in this, it had no legal existence. The dissenting justices contended that the corporation had a legal existence from the time of the passage of the Act; that this would be liable to forfeiture by non-performance of the required conditions; but that the proper way to enforce this would be by writ of *quo warranto* sued out by the State, and not by an injunction granted at the suit of a private individual.

The important question in the case is whether a citizen whose property will be specially affected by acts threatened to be done by certain persons under the illegal authority of a charter can dispute the rights of those persons to act under the charter. Here the plaintiff appears to have been the owner of the fee in the highway, and the case does not differ in principle from an attempt of the illegal corporation to build a road through the plaintiff's field under an illegal (delegated) power of eminent domain. Although the text-writers show that there is some conflict of authority, yet the better view is that the reason for not allowing a private person to attack the validity of an incorporate organization does not apply where the corporation is seeking to enforce against such person, affected by no estoppel, some special right which the corporation possesses only by virtue of its regular and legal existence; i. e., some special right which the Legislature intended to confer only on a legally formed corporation.

CORPORATION, CITIZENSHIP OF.—JURISDICTION OF CIRCUIT COURT.—Although under the Acts respecting the jurisdiction of the Federal Courts, a corporation is a "citizen" only of the State under whose laws it was organized, yet, with respect to the district in which it may be sued, under Act of Congress, March 3, 1887, a railroad or telegraph company, chartered either by a State or the United States, is an "inhabitant" of any State in which it operates its lines and maintains offices for the transaction of business. *United States v. Southern Pac. R. Co.*, 49 Fed. Rep. 297 (Cal.), Circuit Ct.

CORPORATIONS—CORPORATE ENTITY A FICTION—FORFEITURE OF CHARTER FOR ACTS OF STOCKHOLDERS IN INDIVIDUAL CAPACITY.—Defendant corporation, organized under the laws of Ohio, had thirty-five thousand shares of capital stock. In 1882 all of the shares except seven were conveyed to trustees by the owners acting in their individual capacity, upon trust to hold and vote upon the same. It was made the duty of the trustees—who under a similar agreement were to hold the stock of a large number of other companies engaged in the same business—to establish headquarters in New York, and to manage and control the corporate property, dealing with it in such a way as to benefit, not stockholders of defendant company especially, but all the interests represented in the trust (the Standard Oil Trust) as a whole. In *quo warranto* proceedings for the forfeiture of defendant's charter, it was held, that defendant was liable for an agreement made by substantially the whole body of its stockholders, although made by them in their individual capacity and not in the corporate name; and that the agreement in question was *ultra vires*. *State ex rel. Attorney-General v. Standard Oil Co.*, 30 N. E. Rep. 279 (Ohio).

See, in accord, *People v. North River Sugar Refining Co.*, 121 N. Y. 582; which, singularly, was not cited. The court says that the doctrine of the separate legal entity of corporations is at bottom a fiction, and like other fictions, must not be pressed too far.

CRIMINAL LAW—DEATH IN ONE STATE FROM WOUND INFLICTED IN ANOTHER—CONSTITUTIONAL LAW.—A provision in the code of West Virginia that an offender may be prosecuted where his victim dies, is no violation of the State Constitution requiring a trial in the county where the offence is committed. *Ex parte NeNeely*, 14 S. E. Rep. 436 (W. Va.).

CRIMINAL LAW—RE-SENTENCE BY COURT OF APPEAL.—*Held*, that when a prisoner, duly sentenced to death by the trial court, appeals to a higher court, it is not necessary that he should be personally present when the court affirms the sentence, because the court is not imposing a new sentence, but is directing that the former sentence shall be carried out. *Schwab v. Berggren*, 12 Sup. Ct. Rep. 525.

EVIDENCE—AUTHENTICATION OF STATUTE.—*Held*, that when a duly enrolled bill, signed by the President of the United States and by the presiding officers of the two Houses of Congress, is placed in the hands of the Secretary of State, it is fully authenticated as a law of the United States, and no reference can be had to the journals or other records of Congress to show an inaccuracy in the Act as thus authenticated. The law as laid down by Article I, § 5, of the Constitution, that each House shall keep and publish a journal, etc., and Rev. St. U. S. § 895, which declares that certified extracts from the journals "shall be admitted as evidence in the United States courts,"

is perfectly consistent with this decision. *Field v. Clark, Collector, and Boyd v. Unit d States*, 12 Sup. Ct. Rep. 495.

The appellants in this case had based their argument on the ground that a bill, which was signed by the President and the Speakers of the two Houses, is not a valid law unless in fact it was passed by Congress. The validity of this reasoning is admitted by the court, which rests its decision on the point of evidence, refusing to admit as evidence, to show the mistake, the records of Congress. This, of course, amounts to saying that the court will not act in such cases at all, for the records of the two Houses are surely the best evidence of their proceedings. See also 46 N. J. Law, 173; 63 Miss. 512; 81 Me. 538.

EVIDENCE—CONTRACTS—EFFECT ON STRANGERS.—A contract in terms a bailment of a snow-plough for ninety-nine years could be shown by parol evidence by plaintiff, a stranger not privy to the contract, to be in truth a sale disguised in this form to defraud plaintiff of a commission due on sale of first plough. *Nat. Car & Locomotive Builder v. Cyclone Steam Snow-Plough Co.*, 51 N. W. Rep. 657 (Minn.).

MORTGAGE—SUBSEQUENT IMPROVEMENT—MECHANICS' LIEN HAS PRIORITY OVER MORTGAGE.—The Alabama Code provides for a mechanics' lien on buildings and improvements to extent of interest of owner, and gives such lien priority over all liens existing or subsequent. A. has a mortgage on unfinished building; B., a builder, completes it. *Held*, A.'s mortgage is superior to B.'s lien as to the property before B. began work, but inferior to B.'s lien in respect to the added value given by B. B.'s lien on improvements may be enforced by sale of whole property under decree of court. Two judges dissented, on the ground that the mechanics' lien was intended to be prior only when a wholly separate improvement was made; that the improvement here was inseparable; and that the lien extended only to mortgagor's equity of redemption. *Wimberly v. Mayberry*, 10 So. Rep. 157 (Ala.).

MUNICIPAL CORPORATIONS—POWER TO ISSUE NEGOTIABLE BONDS.—The city of B had, by its charter, power to borrow money "for general purposes, not exceeding \$15,000, on credit of said city." The charter also contained a provision that "bonds of the city shall not be subject to tax under this Act." *Held*, that the city has no power to issue negotiable bonds for this amount, and that such bonds are void in the hands of *bona fide* purchaser. *Held*, also, that "power to borrow for general purposes" means for such purposes only as are usually carried out by the revenue received from taxes. The court overrule *Rogers v. Burlington*, 3 Wall. 654, and *Mitchell v. Burlington*, 4 Wall. 270. Harlan, Brewer, and Brown, J. J. dissent. *City of Brenham v. German-American Bank*, 12 Sup. Ct. Rep. 559.

The court say that by the charter the city has power to issue non-negotiable bonds, but that this power is distinguishable from that of issuing negotiable bonds.

MUNICIPAL CORPORATIONS—POWER TO BORROW—IMPLIED POWER TO ISSUE BONDS.—A Statute of Massachusetts authorized defendant town to subscribe for shares in a projected railroad, and to raise by loan or taxes the necessary money. *Held*, in an action upon bonds issued under this provision, that the power to borrow included an implied power to issue negotiable instruments. *Commonwealth v. Town of Williamstown*, 30 N. E. Rep. 472 (Mass.).

The court decline in terms to follow *Merrill v. Town of Monticello*, 138 U. S. 673; their opinion being in accord with that expressed by Mr. Hackett in the REVIEW, vol. v. p. 157, and again on p. 73 of the present volume.

SET-OFF—INSOLVENT BANK—RIGHTS OF DEPOSITORS.—A depositor in an insolvent bank, who had indorsed a note that was subsequently discounted by said bank, can, in a suit by the bank to recover the amount of the note, set off his deposit against this amount, when the note matured after the insolvency of the bank. Refusing to follow *Armstrong v. Scott*, 36 Fed. Rep. 63, and *Stephens v. Schuchmann*, 32 Mo. App. 333; *Bank v. Price*, 22 Fed. Rep. 697, distinguished. *Yardley v. Clothier*, 49 Fed. Rep. 337 (Pa.), Circuit Ct.

STATUTE, CONSTRUCTION OF.—The Alien Contract Labor Law prohibits the importation of "any" foreigner under contract to perform "labor or service of any kind." The plaintiff was an alien residing in England. The parish of Trinity Church contracted with him to come to this country to act as their rector. The United States began this action on the ground that the plaintiff was within the prohibition of the Statute. The court reverses the decision of the Circuit Court in favor of the Government (36 Fed. Rep. 303), holding that although clergymen are within the letter of the law, the Legislature never intended that the law should extend to them. *Rector etc. of Holy Trinity Church v. United States*, 12 Sup. Ct. Rep. 511.

The effect of this decision is, as the court says, that the court may in its discretion override the express language of an Act in order to give effect to the supposed intention of the Legislature. The intention in this case is gathered from the early history of this country, which shows that our people is a religious people, and would not interfere with whatever aided in the advancement of religion. This is undoubtedly true, as a matter of fact, and yet it may be asked whether in making a decision like this, the court is not getting on very uncertain and dangerous ground.

STATUTE, CONSTRUCTION OF.—SPIRITUOUS LIQUORS.—Beer is not a "spirituous liquor" within the meaning of Rev. St. U. S. § 2139, denouncing the offence of selling "spirituous liquors or wine" to Indians. *In re McDonough*, 49 Fed. Rep. 360 (Mon.) Dist. Ct.

The court construes the Statute as above on the ground that "spirituous liquor" means distilled as distinguished from fermented liquor. This meaning of the term is reinforced in this case by the general rule "that, if possible, in the construction of a Statute, every word should be considered of use, and given a proper meaning;" while, under the interpretation contended for, the word "wine" in the Statute under consideration would be redundant and useless.

STATUTE CONSTRUCTION (F).—A saloon-keeper who allows his bartender to enter the saloon on Sunday and help himself to a glass of beer is guilty of offence of keeping his saloon open on Sunday. *People v. Crowley*, 51 N. W. Rep. 517 (Mich.).

STATUTE OF LIMITATION—DISCOVERY OF FRAUD.—Gen. St. Minn., c. 66, § 6, subd. 6, provides a six years' limitation in action for relief on the ground of fraud, and that the cause of action shall not be deemed to accrue until the discovery of the fraud. *Held*, that the Statute cannot be avoided, on the ground of delay in discovering the fraud, by a land-grant railroad company with respect to lands lying within its place limits, which have been selected as indemnity lands by another land-grant company, and have been certified to the State as such, and by it conveyed to the company; since all these proceedings were necessarily matters of public record, which it was inexcusable neglect not to discover. 44 Fed. Rep. 817, and 32 Fed. Rep. 821, reversed. *St. Paul, S. & T. F. Ry. Co. v. Sage*, 49 Fed. Rep. 315 (Minn.) Circuit Ct. of App.

SURETYSHIP—DISTINCTION BETWEEN SURETY AND GUARANTOR.—DISCHARGE OF SURETY.—Contract for service, with bond for faithful performance of duty, signed by agent and three sureties. *Held*, that this was not a contract of guaranty, but of suretyship, as the sureties executed the same instrument as the principal, and could therefore be sued in the first instance, or joined, as here, as co-defendants with the principal. One of the sureties could not withdraw, after the bond was executed, even with notice to the obligee, without his express consent. *Saint v. Wheeler & Wilson Manuf. Co.*, 10 So. Rep. 541 (Ala.).

This decision is in accord with 63 Ala. 419, at p. 423, and enforces again the rather fine distinction between the surety, whose liability to third persons is a direct and primary liability, and the guarantor, whose liability is only secondary.

TORT—MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF MAGISTRATE.—In an action for malicious prosecution, the defendant made and signed a complaint charging plaintiff with breaking and entering. The trial resulted in the plaintiff's acquittal. *Held*, that evidence that defendant in making the complaint acted on the advice of a justice of a district court, to whom the complaint was addressed, is admissible, as tending to show that defendant acted in good faith and with probable cause. *Monaghan v. Cox*, 30 N. E. Rep. 467 (Mass.).

We may gather from the decision that if *Almstead v. Partridge*, 16 Gray, 381 [1860], were to arise to-day, it would be decided differently.

TRADE NAME—GOOD WILL.—By putting a particular name on a building as a sign of the hotel business, a tenant does not make the name a fixture to the building so that it becomes the property of the landlord upon the expiration of the lease. Such a name is personal to the proprietor, and not an element of good-will of the business. *Vanderbank v. Schmidt*, 10 So. Rep. 617 (La.); s. c. 44 La. Ann. See an article by G. D. Cushing in 4 Harv. Law Rev. 321, "On Certain Cases Analogous to Trade-marks."

WILL—CONSTRUCTION.—The testator, by his will, directed "that any or all notes, bills, or other evidence of indebtedness against any of my said brothers held by me at the time of my decease be cancelled by my said executors and delivered up to the maker or makers thereof without payment of the same." *Held* that this clause did not include joint and several notes, given after the date of the will by a partnership of which a brother was a member to raise money to carry on the partnership business. *Waterman v. Alden*, 12 Sup. Ct. Rep. 435.

The point involved in this case is one on which the authorities are in conflict. In 121 N. Y. 280, the court decided that a pledge of collateral to secure the defendants' indebtedness to the plaintiff bank, did not include debts due from the firm of which the defendant later became a member. The court said that the mercantile idea of a partnership is that it is a distinct person from the partners, and that as the mortgage was executed by business men, it must be construed in that sense, although in law the firm is not distinct from its partners. In 154 Mass. 359, the court decided that collateral deposited "applicable on any note or claim against me" by the pledgee could be held to secure acceptances by a firm to which the pledgor belonged which had been discounted by the pledgee. The court says that partners must be considered as knowing that claims against their firm are claims against them personally, and that their written contracts must be construed in the light of such knowledge. In *Waterman v. Alden*, the court has adopted the New York view, thus reaching what seems the better result. It is hard to see why a court when construing a business man's instrument should refuse to read it in the light of an ordinary man's knowledge, should insist on presuming that a man knows what very few probably do really know, and then construe the instrument with a total disregard for what is meant by the parties.

WILL — CONSTRUCTION. — A testator devises a freehold estate to seven persons as "joint tenants, and not as tenants in common, and to the survivor of them, his or her heirs and assigns forever." The testator died after the coming into operation of the Wills Act (1 Vict. c. 26, the effect of which was to make the word "heirs" unnecessary to the devise of a fee). *Held*, that the effect of the devise was to make the devisees joint tenants for life, with a contingent remainder in fee to the survivor. *Quarm v. Quarm* [1892], 1 Q. B. 184 (Eng.).

REVIEWS.

COMMENTARIES ON THE LAW OF SALES AND COLLATERAL SUBJECTS, by Jeremiah Travis, LL.B. Two volumes, pp. xiii, 808. Boston: Little, Brown, & Co., 1892.

The author's claim in behalf of these two large volumes is that they present a fresh treatment of their topic: "the work is an absolutely new one on the subject, not a rehash of Blackburn, Benjamin, or any other writer" (p. xiii). This claim to independence is justified. Mr. Travis's book has nothing in common with the undigested compilations of authorities, — good, bad, and indifferent thrown in together, — which sometimes masquerade as treatises on the law. So much one can say in praise of its general plan. One should add that on many points the author's criticisms are acute; that his industry must have been enormous; that the book is provided with an excellent analytical index; and that the work of printer and binder, as might have been expected, is admirably done.

As a whole, however, the book will supersede neither Blackburn nor Benjamin. To the student, the former is infinitely more helpful. The general impression left by Mr. Travis is that he has criticised cases rather than principles, and the result in the reader's mind is confusion. There is too much detail; the book is too big. Yet, curiously, the objection brought against it by the general practitioner will be exactly the reverse of this. Mr. Travis not only treats the existing case law very cavalierly, but he fails to state with even reasonable fullness what it is. For example, under the seventeenth section of the Statute of Frauds, he devotes eleven pages to a discussion of the series of English cases upon the distinction between contracts of sale and those for work and labor. From his silence as to other jurisdictions, one would naturally infer

that *Lee v. Griffin* had settled this question for the entire English speaking world. There is no reference, even in a footnote, to the fact that the rule of *Lee v. Griffin* is in general not followed in the United States.

In view of the author's evident ability, his good will to the Law School, and the prominent mention which he makes of his previous relations to it, we regret that we cannot give this book a heartier welcome.

P. S. A.

THE FEDERAL POWER OVER COMMERCE, by William Draper Lewis, Ph. D. Philadelphia: University of Pennsylvania Press, 1892. pp. xvi and 145.

Every student of Constitutional law will gladly welcome this little treatise on the "Commerce Clause" of the United States Constitution. It presents the subject in a bright and systematic fashion, tracing the historical development of the law through the many Supreme Court decisions, and pointing out clearly wherein the principles laid down by the court in its earlier days have later been extended, modified, or abandoned. No one who has tried to reconcile to his own mind the seemingly conflicting decisions on interstate commerce will fail to recognize the amount of study involved in this little volume. Mr. Lewis is to be congratulated on his success in putting the law on this subject in so definite and satisfactory a form.

F. B. J.

THE NEW EMPIRE, by O. A. Howland. New York: The Baker and Taylor Co., 1891.

Mr. Howland's object is to urge the advantages to be derived from the creation of an International Supreme Court for the determination of differences that may arise between Great Britain and the United States. It is to be regretted that he has not made an argument for the practicability of such a tribunal worthy of his admirable exposition of its benefits. If the two governments are to exist for purely municipal purposes, an executive must be found to enforce the decisions of this quasi-federal court, and an Anglo-American Legislature will be needed to prescribe rules for the executive. The practical objections to the plan are as insurmountable to-day as in the time of Sam Adams.

G. T. H.

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RECENT STATE CONSTITUTIONS.¹

ONE of the most marked features of all recent State constitutions is the distrust shown of the Legislature. The four constitutions we are examining afford further illustration of this increasing tendency. Professor Thorpe, in his paper before referred to, on the constitutions of North and South Dakota, Montana, and Washington, finds that the principal prohibitions on the Legislature are: on enacting any private or special legislation; on extinguishing or releasing the obligations of corporations or of individuals to the State; on legislative bribery; on personal or private interest in a bill, in any member; on irregular form in framing bills; on appropriations of money; on performing legislative functions by deputy; on loaning the credit of the State to corporations; and on authorizing or entertaining money bills during the last hours of the Legislature. In the four constitutions now under examination these restrictions are, if anything, yet more marked.

Mississippi (sec. 87) provides in general that no special or local law shall be enacted for the benefit of individuals or corporations in cases which are or can be provided for by a general law, or when the relief sought can be given by any court of the State; nor shall the operation of any general law be suspended for the benefit of any individual or private corporation or association; and in all

¹ Continued from the May number of the Harvard Law Review.

cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted.

So in Kentucky (sec. 62), thirtieth, it is provided, in addition to the twenty-nine special prohibitions alluded to below, that where a general law can be made applicable, no special law shall be enacted. And in Wyoming (Art. III. end of sec. 27) there is the same clause.

But who is to see to it that this rule shall be followed? Who is to be the judge whether a general law is feasible? Would not the Supreme Court decide that this is for the Legislature to determine, and that the fact that they had passed a special law in some new case was sufficient evidence that a general law could not be made applicable? Even supposing some palpable case in which the Legislature passed a special law, where obviously a general law would do, it would require a Supreme Court of uncommonly strong calibre to decide such a special law to be unconstitutional and void.

To guard against this danger of passing special laws, it is also provided in Mississippi (sec. 89) that no local or private bill shall be passed by either House until it shall have been referred to a standing committee on local and private legislation, and shall have been reported back with a recommendation in writing that it pass, stating affirmatively the reasons therefor, and why the end to be accomplished could not be reached by a general law or by a proceeding in court; or if the recommendation of the committee be that the bill do not pass, then it shall not pass the House to which it is so reported, unless it be voted for by a majority of all the members elected thereto. If, however, it be so passed (unless on some subject prohibited), the courts shall not, because of its local, special, or private nature, refuse to enforce it. So in this State, at least, the power of the courts is specially curtailed in this regard; that is to say, the convention, after taking most minute pains to guard against abuse of power by the Legislature, has expressly denied to the courts the power to declare this class of legislation unconstitutional! In the constitutions of Kentucky, Idaho, and Wyoming no provision is made on this subject.

Each constitution, moreover, contains a long list (Miss., sec. 90; Ky., sec. 62; Idaho, Art. III. sec. 19; Wy., Art. III. sec. 27) of subjects in regard to which the Legislature is prohibited, absolutely and without any qualification, from passing special laws. It would take too much space to summarize this list at length, though

it is hardly possible in any other way to give an adequate idea of the petty restrictions by which the Legislature is bound and obstructed, hand and foot. But some conception may be gained from the following characteristic examples. In three or more of the four States special laws are absolutely forbidden,—

1. Regulating the practice in courts of justice ; ¹ providing for change of venue in civil or criminal causes ; limiting civil or criminal actions ; regulating the punishment of crimes, or remitting fines ; or drawing grand or petit juries.

2. Exempting property from taxation ; or refunding money legally paid into the State Treasury.²

3. Restoring to citizenship persons convicted of infamous crimes ; removing the disability of infancy ; providing for the adoption or legitimation of children ; changing the law of descent, succession, or distribution ; granting divorces ; changing the names of persons ; ³ giving effect to invalid deeds or wills ; ⁴ or any legislation in regard to the estates of deceased persons, minors, or *cestuis que trustent*.

4. Regulating the rate of interest on money, or authorizing the creation, extension, or impairment of liens.

5. Granting the right to lay railroad tracks,⁵ or providing for the support of any private school.

6. Laying out or vacating highways, or licensing ferries, bridges, or toll-roads.⁶

7. Changing the emoluments of any public officer.⁷

¹ Or changing the rules of evidence in any trial (Wyoming).

² So, also, in regard to releasing the indebtedness or liability of any person or corporation, or extending the time for the collection of taxes (Idaho and Wyoming) ; or legalizing, as against the State, the invalid act of any officer (Idaho).

³ Or of places either (Idaho and Wyoming).

⁴ Or legalizing, except as against the State, the invalid act of any officer, etc. (Kentucky).

⁵ So, also, granting lands under the control of the State to any person or corporation, or conferring power to exercise the right of eminent domain (Mississippi) ; granting or amending any charter (Kentucky and Idaho) ; granting charters to banks, insurance companies, or loan and trust companies (Wyoming).

⁶ Similarly, in Kentucky, special laws are forbidden declaring streams navigable, authorizing the construction of booms or dams, or the removal of obstructions, or providing for the protection of game and fish, or regulating fencing and the running at large of stock.

⁷ The following, though occurring in less than three of the constitutions, are amusing or interesting enough to be worth notice. In Kentucky the Legislature cannot apply "local option" to a special place or pass special laws to regulate "labor, trade, mining, or manufacturing." Changing the boundaries of wards is a forbidden subject

Even rules of procedure for the Legislature are drawn into these constitutions; how minutely in one case may be seen from the following summary of the provisions in Mississippi. The other States are not carried by distrust of their representatives to quite the same extreme. It is provided in Mississippi (sec. 55) that the yeas and nays shall be entered on the journal on the final passage of every bill. (Sec. 59) Every bill shall be read in full immediately before the vote on its final passage, and having passed both Houses, shall be signed by the President of the Senate and the Speaker in open session. Before either shall sign any bill, he shall give notice thereof, suspend all business, have the bill read by its title, and on the demand of any member, have it read in full, and all such proceedings shall be entered on the journal.¹ (Sec. 60) No bill shall be so amended in its passage through either House as to change its original purpose;² and no law shall be passed except by bill.³ (Sec. 61) No law shall be revived or amended by reference to its title only, but shall be inserted at length.⁴ (Sec. 62) No amendments to bills by one House shall be concurred in by the other, except by a vote of a majority thereof, taken by yeas and nays, with the names of those voting for and against, recorded upon the journals. Reports of committees of conference shall be adopted in each House in the same way. (Sec. 63) No appropriation bill shall be passed by the Legislature which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury. (Sec. 64) No appropriation bill shall continue in force more than six months after the meeting of the Legislature at its next regular session; nor shall such bill be passed except by the votes of a majority of all the members elected to each House.⁵ (Sec. 65) All votes on the final passage of any measure shall be subject to reconsideration for at least one whole legislative day, and no motion to reconsider such vote shall be disposed of adversely on the day on which the

in Kentucky and Idaho; changing or locating a county seat in Kentucky; "regulating township or county affairs," in Idaho and Wyoming; incorporating cities, towns, or villages, or amending their charters, in Wyoming; and in Mississippi, exempting any person from jury, *road*, or other civil duty!

¹ Compare Idaho, Art. III. sec. 15; Wyoming, Art. III. secs. 25, 28, 41; and Mississippi, sec. 72.

² So Wyoming, Art. III. sec. 20.

³ So Idaho, Art. III. sec. 15, and Wyoming, Art. III. sec. 20.

⁴ So Kentucky, sec. 53; Idaho, Art. III. sec. 18; and Wyoming, Art. III. sec. 26.

⁵ The latter provision is also found in Kentucky, sec. 48.

original vote was taken, except on the last day of the session. (Sec. 66) No law granting a donation or gratuity in favor of any person or object shall be enacted, except by the concurrence of two-thirds of each branch of the Legislature; nor, by any vote, for a sectarian purpose or use. (Sec. 67) No new bill shall be introduced into either House during the last three days of the session.¹ (Sec. 68) No appropriation and revenue bills shall be passed during the last five days of the session. (Sec. 69) General appropriation bills shall contain only appropriations to defray the ordinary expenses of the executive, legislative, and judicial departments, to pay interest on State bonds, and to support common schools. All other appropriations shall be by separate bills, each embracing but one subject. Legislation shall not be engrafted on appropriation bills, but the same may prescribe the conditions on which the money may be drawn, and for what purposes paid. (Sec. 70) No revenue bill nor any bill assessing property for taxation shall become a law except by a vote of at least three-fifths of the members of each House present and voting. (Sec. 71) Every bill shall have a title which ought to indicate clearly the subject-matter of the proposed legislation.² Each committee to which a bill may be referred shall express in writing its judgment of the sufficiency of the title of the bill, and this too whether the recommendation be that the bill do pass, or do not pass. (Sec. 73) No bill shall become a law until it shall have been referred to a committee of each House, and returned therefrom with a recommendation in writing.³

Idaho (Art. III. sec. 12) even goes so far as to direct that the business of each House and of the committee of the whole shall be transacted openly, and not in secret session. The provision in Wyoming (Art. III. sec. 14) to the same effect is not so imperative, for it makes an exception if "the business is such as requires

¹ In Wyoming, five days; with an exception in favor of bills for the expenses of the government, and a provision that this rule may be suspended by unanimous consent.

² In Kentucky, sec. 53, and Idaho, Art. III. sec. 60, no law shall relate to more than one subject, which shall be expressed in the title, with the addition in the latter State that if this provision be not complied with, only so much of any Act as shall not be embraced in the title shall be void. So in Wyoming, Art. III. sec. 24; but general appropriation bills and bills for the codification and general revision of the laws are exempt from the necessity of stating the subject in the title.

³ In Kentucky, sec. 48, it is provided that no bill shall be considered for final passage unless reported by a committee and printed for the use of the members. So in Wyoming, Art. III. sec. 23. But in Kentucky if a committee fails to report a bill within a reasonable time, any member may call it up, and by consent it may be considered as if reported.

secrecy," with no restriction, however, upon the exercise of the power of declaring whether the business is such as really requires secrecy.

In Kentucky (sec. 57) no Act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when by the concurrence of a majority of the members elected to each House, by a yea and nay vote entered upon their journals, an Act may become a law when approved by the Governor; "but the reasons for the emergency that justifies this action must be set out at length in the journal of each House."

This is plainly insufficient, for there is no provision made that the Supreme Court can pass upon the question whether the emergency was real. In the absence of such a provision, no court would undertake to pass upon such a question, but would declare the Legislature to be the sole judge of the question. If it is necessary to place such restrictions upon the power of the Legislature, and then to enlarge its powers in case of "emergency," it would seem to be equally necessary to guard against abuse of this enlargement by giving power to the Supreme Court to declare an Act unconstitutional and void, when the emergency under pretext of which the Act was passed was not real. There is a similar defect in the constitution of Idaho, in regard to the provision there adopted (Art. III. sec. 22):—that, except in case of "emergency," which shall be declared in either the preamble or body of the Act, no law shall take effect until sixty days from the end of the session at which it was passed.

Further evidence of the apprehension that the Legislature may go wrong is afforded by section 121 in Mississippi, which provides that when convened in extraordinary session, by public proclamation of the Governor, the Legislature shall have no power to consider or act upon anything not designated in the proclamation, or submitted to them in writing by the Governor, except impeachments and examination into the accounts of State officers. In Kentucky (sec. 83) and Idaho (Art. IV. sec. 9) there are similar limitations.

In Idaho (Art. III. sec. 10) it is provided that, a quorum being in attendance, if either House fail to effect an organization within the first four days thereafter, the members of the House so failing shall be entitled to no compensation from the end of the said four days until an organization shall have been effected.

Kentucky (sec. 44) and Idaho (Art. III. sec. 23) provide in their constitutions a fixed compensation for the members of their Legislatures (five dollars a day and mileage). Kentucky wisely allows this to be changed by law (but no change shall take effect during the session at which such change is made; and sessions are limited to sixty days, except the first session). Wyoming (Art. III. sec. 6) fixes the compensation of the first Legislature (five dollars a day and mileage). No session after the first, which may be sixty days, shall exceed forty days. After the first session the compensation of members shall be as provided by law; but no Legislature shall fix its own compensation. Mississippi (sec. 46) leaves the compensation to be prescribed by law; but no alteration can take effect during the session at which it is made.

Idaho (Art. III. sec. 23) provides that whenever any member of the Legislature shall travel on a free pass in coming to or returning from the session of the Legislature, the number of miles actually travelled on such pass shall be deducted from the mileage of such member. Mississippi (sec. 188) forbids railroads or other transportation companies granting passes or tickets free, or at a discount, to members of the Legislature, or to any State, district, county, or municipal officers, except Railroad Commissioners. Kentucky (sec. 205) still more stringently provides that no common carrier, under heavy penalty, to be affixed by the General Assembly, shall give any free passes, or sell tickets at reduced rates not common to the public, to any State, district, city, town, or county officer, or member of the General Assembly, or judge. Any such person who shall accept the above shall forfeit his office.

Finally, the following scattered restrictions are worth notice, in addition to those mentioned by Professor Thorpe (see above) as common to the four constitutions discussed by him:—

In Mississippi (sec. 99), the Legislature shall not elect any other than its own officers, the State Librarian, and United States Senators, but it may appoint Presidential Electors. (Sec. 100) No obligation or liability due the State, levee board, county, city, or town shall ever be remitted, released, postponed, or diminished, etc. (but doubtful claims may be compromised). (Sec. 92) The Legislature shall not authorize the payment to any person of the salary of a deceased officer beyond the time of his death; nor (sec. 93) shall it retire an officer on pay or part pay, or make any grant to him. (Sec. 96) The Legislature shall never grant extra

compensation, fee, or allowance to any public officer, agent, servant, or contractor, after service rendered or contract made; nor authorize payment, or part payment, of any claim under any contract not authorized by law; nor (sec. 95) shall lands belonging to the State ever be donated, directly or indirectly, to private corporations or individuals, or to railroad companies; nor sold to corporations or associations for a less price than to individuals.

We are reminded of the anecdote of the Irish groom who confessed to his priest he had fed the horses on wooden oats. He was reproached for it by his father confessor, who asked him where he had learned such wickedness; and his answer was that he never had heard of it until he had been asked by this same father, at some preceding confession, whether he had ever done it!

In the new constitution of Kentucky, also, further vexatious restrictions upon the power of the Legislature are to be found. Sec. 46 provides that no senator or representative shall, during the term for which he was elected, or for one year thereafter, be appointed or elected to any civil office of profit in the State which shall have been created, or the emoluments of which shall have been increased, during his term, except to such offices as are filled by the election of the people. Sec. 47 provides that no person who at any time may have been a collector of public moneys for the State, or for any county, city, town, or district, shall be eligible to the General Assembly, unless he shall have obtained a *quietus* six months before the election.

Debts contracted by the General Assembly to meet casual deficits in the revenue shall not exceed five hundred thousand dollars, and the money arising from such loans shall be applied only to the purposes for which they were obtained, or to repay such debts; but the General Assembly may contract debts to repel invasion, suppress insurrection, etc. (sec. 51).

In any Act to create a debt (except those last provided for), provision shall also be made for the levy and collection of an annual tax to pay the interest stipulated, and to discharge the principal within thirty years; and such an Act shall not take effect until after submission to the people at a general election; but the General Assembly may contract debts by borrowing money to pay any part of the State debts, without submission to the people and without provision for a tax to discharge such debt or the interest thereon (sec. 52). Sec. 61 in Kentucky provides that the Legislature shall neither audit nor allow any private claim or account against the

State. One is tempted to inquire whether this convention expected the State Legislature to consist of fools and knaves.

A noticeable prohibition in Mississippi is to be found in sec. 98. "No lottery shall ever be allowed, or be advertised by newspapers, or otherwise, or its tickets be sold in this State ; and the Legislature shall provide by law for the enforcement of this provision ; nor shall any lottery heretofore authorized be permitted to be drawn or its tickets sold." So in Idaho (Art. III. sec. 20) the Legislature is forbidden to authorize any lottery or gift enterprise. So in Kentucky (sec. 235).

Passing now to a comparison of the powers and duties of the Executive in these four States, we find here also the same disposition towards minute and often petty limitations.

In Mississippi (sec. 116), Kentucky (sec. 72), and Wyoming (Art. IV. sec. 1), the Governor shall hold his office for the term of four years ; in Idaho (Art. IV. sec. 7), for two years. The longer term would seem to be preferable on many accounts. If he holds his office no longer than the Legislature, and is elected at the same time, any sudden change of feeling by the voters may change the Legislature and the Executive at the same time, which would tend to a departure from stability of administration. In Kentucky (sec. 73) and Mississippi (sec. 116) he is ineligible for the succeeding four years after the expiration of his term of office, — a mark of the fear entertained that a Governor would become too powerful if allowed to be immediately re-elected.

We will not dwell upon the usual powers given to the Governor in these four constitutions, since our object is not to give a full account of them, but rather to point out wherein recent constitutions depart from the older ones, and to consider the causes and effects of such departures.

The usual power of veto is given to the Governor in Mississippi (sec. 73). In addition, he may veto parts of any appropriation bill, and approve parts. So in Idaho (Art. IV. sec. 11), and in Wyoming (Art. IV. sec. 9). None of these four States, however, follow the examples of Washington and Montana, in giving the power to the Governor to veto parts of any bill.

Elaborate provisions had been made in many recent constitutions for a board of pardons ; as, for instance, in South Dakota and Montana. So, in Idaho (Art. IV. sect. 7), such a board is created, to consist of the Governor, Secretary of State, and Attorney-General. This board — or, in Wyoming (Art. IV. sec. 5),

and also in Mississippi (sec. 124), and in Kentucky (sec. 80), the Governor alone — may remit fines and forfeitures and grant reprieves and pardons (except in cases of treason or impeachment). The curious provision that no pardon shall be granted before conviction is common to Mississippi, Wyoming, and Idaho. The question naturally arises: Before conviction what is there to pardon? In Mississippi it is provided that in cases of felony, after conviction, no pardon shall be granted until the applicant shall have published for thirty days, in some newspaper in the county where the crime was committed, etc., his petition for pardon, setting forth the reasons why it should be granted. In Kentucky, the Governor shall file with each application for pardon a statement of the reasons for his decision thereon, and both application and statement shall always be open to public inspection. So in Idaho (Art. IV. sec. 7), the Board of Pardons shall advertise hearings upon applications for pardon, and shall reduce their proceedings and decisions to writing, with their reasons for their action in each case, and the dissent of any member; all to be filed in the office of the Secretary of State. In Wyoming (Art. IV. sec. 5) the Legislature may pardon, commute the sentence, direct its execution, or grant further reprieve after a reprieve by the Governor, in cases of conviction for treason; and the Governor shall communicate to the Legislature, at each regular session, each case of remission of fine, reprieve, commutation, or pardon granted by him, with full details as specified, and his reasons. All these minute provisions may be necessary to prevent the abuse of the so-called power of pardon, but they also show the apprehensions felt lest the Governor be not a man to be trusted.

Another striking evidence of the same fear is to be found in the provisions concerning bribery of or by the Governor, in the four constitutions we are examining.

Wyoming (Art. IV. sec. 10) follows the example of North and South Dakota by guarding in the constitution against bribery of the Governor or bribery by him. Why encumber a constitution with such details of legislation? For of course a statute of the Legislature will provide for all cases of bribery. And it may well be doubted whether such deep-seated corruption can be prevented by constitutional or legislative inhibition. If the Chief Executives of our States are to be men open to receive or give bribes, the remedy would seem to be, not provision against it by constitution or statute, but the awakening of the moral sense of the people.

In the older constitutions the administrative officers were appointed by the Executive, and this still continues to be done in some States. In the next period of constitution-making they were elected by the Legislature. But in the latest constitutions (Kentucky, sec. 94; Wyoming, Art. IV. sec. 11; Idaho, Art. IV. sec. 2; and Mississippi, secs. 128, 133, 134, and 143), following the example of North Dakota, South Dakota, Montana, and Washington, they are all elected by the people. Such a uniform system, common to the last eight new constitutions, is noteworthy, and indicative of the continued growth of democracy. It is the better view of political students that the administration of the business of the State should be managed more like the business of corporations not in politics; that the tenure of office of the principal State officers should be subject to change when the Governor is changed by the vote of the electors, but that subordinate officers should remain in office during good behavior; and that all such officers should be, subject to these principles, under the control of the Governor, who, in turn, should then be held to a strict accountability by the electors for the way in which he manages the affairs of the State. In this way only can the Executive be made an equal and co-ordinate department of the government, and thus become an object for the ambition of a higher class of men than at present. But obviously such is not the trend of the development of constitution-making. More than ever, the people are taking on themselves the burden of governing the State. Let us hope that general public education, the spread of a higher morality with the increase of civilization, will more and more fit them to succeed in their undertaking.

These four constitutions follow the usual course of older ones with regard to the judicial department, in providing one Supreme Court not subject to the powers of the Legislature, and subordinate courts, some of which, more especially the lower ones, are subject to change by the Legislature. In Mississippi (sec. 145), the Governor, by and with the advice and consent of the Senate, appoints the judges of the Supreme Court, and (sec. 153) the judges of the Circuit and Chancery Courts also. In Kentucky (sec. 121), the judges of the Court of Appeals are elected by districts. In Wyoming (Art. V. sec. 4) and in Idaho (Art. V. sec. 6) they are elected by the people at large,—thus furnishing further evidence of the growth of democracy. It must be admitted that under a system of elective judges the result is much better than

might be anticipated. Still, it is a crying evil that under such a system, as in New York, the judges are expected to contribute liberally to campaign funds.

In Kentucky (sec. 117) the Governor may remove the judges of the Court of Appeals, the highest court in the State, "for any reasonable cause," upon the address of two thirds of each House, the cause to be set forth in the address and the journal of each House. There is no provision made here for any investigation of the charge, and no opportunity given to the accused judge to defend himself. In every particular this mode of removing a judge is inferior to the usual mode of trial by impeachment. This constitution (sec. 141) also contains a most unusual provision, forbidding the establishment of any courts save those there provided. It is difficult to see any reason for this inhibition.

Idaho (Art. V. sec. 1) abolishes the distinction between actions at law and suits in equity, and prohibits any distinction in form between actions and suits. One form of action, it is declared, shall include the enforcement or protection of private rights, and the redress of private wrongs. A more radical change can hardly be conceived than is made in these few words; and the development of a new system of procedure thereunder will be watched with interest.

Under section 17 of the same article no judge of the Supreme Court or District Court shall be paid his salary or any part thereof unless he shall have first taken and subscribed an oath that there is not in his hands any matter in controversy not decided by him which had been finally submitted for his consideration and determination thirty days prior to this oath. The intention is praiseworthy, but the manner chosen to carry it into effect is hardly consistent with the dignity of a judge's position.

Of all men in the community judges seem to have the best opportunity of becoming acquainted with the deficiencies of the law; and, removed from partisanship, their recommendations would naturally be both impartial and of practical value. Idaho (Art. V. sec. 25) recognizes this possibility by providing that the judges of the District Courts shall annually, on or before July 1, report in writing to the Justices of the Supreme Court such defects and omissions in the laws as their knowledge and experience may suggest; and that the Justices of the Supreme Court shall annually, on or before December 1, report in writing to the Governor — the report to be by him transmitted to the Legislature with his message — such defects and omissions both in the Constitution and in the laws as

they may find to exist. They should also have been directed to suggest a remedy.

Enough of these constitutions has been quoted to show their manifest faults, their verbosity, and their omissions. They all err in incorporating into the organic law matter that should have been left for legislation. In an admirable article on the subject of Constitutional Prohibition, published March 9, 1889, in the "Cambridge Tribune," Professor Thayer of the Harvard Law School wrote: "Our State constitutions (I do not speak now of the national Constitution . . .), besides providing for the framework of government, the qualifications of electors, and the like, were made to be the guarantee and charter of a few simple, well-established, uncontroverted principles, lest in moments of passion or inadvertence, or under the temporary pressure of special interests, these should be disregarded. They were not made to be codes of laws, or to embody the opinion of a momentary majority upon an entirely unsettled question."

Judge Cooley, being called upon to address the constitutional convention that met at Bismarck in 1889, spoke as follows: "In your constitution-making, remember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that is to go on hereafter for all time; and if the period should ever come which we speak of as the millennium, I still expect that the same thing will continue to go on there, and even in the millennium people will be studying ways whereby, by means of corporate power, they can circumvent their neighbors. Don't, in your constitution-making, legislate too much. In your constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly belongs to the field of legislation to the Legislature of the future. You have got to trust somebody in the future, and it is right and proper that each department of government should be trusted to perform its legitimate function."

But these principles were disregarded in the constitutions before us. It would seem instead as if the theory underlying them were that the agents of the people, whether legislative, executive, or judicial, are not to be trusted; so that it is necessary to enter into the most minute particulars as to what they *shall not* do.

This naturally has given rise to the opinion we so often hear expressed, that there is an increasing distrust in this country of representative institutions, and that this is proved by the increasing passage of constitutional restrictions upon the power of the Legislature, by the prohibition of special legislation, by the adoption of biennial instead of annual sessions, and by the grant to municipalities of more complete local self-government, in derogation of the former powers of the Legislature over them. It has been said that making biennial the session of Legislatures is a movement backward in the march of free government. And Bryce,¹ commenting on an address delivered by Mr. Charles H. Butler in 1886, calls this a rather pitiful result for a self-governing democracy to have arrived at. But with all respect to such authority, there seem to be valid reasons for arriving at very opposite conclusions.

We hope that our criticisms will not be misunderstood, nor deemed inconsistent. A constitution should affirm general principles, leaving details to legislation. All four of these constitutions violate this rule, and are therefore faulty. With every change in development, education, and civilization, it will be found that modifications in detail—the proper subject for statutes—can only be made through amendments of the organic law. If such are constantly made, the constitution is cheapened and brought into disrespect; if they are not made, it galls and irritates.

But the general principle of the right to locate self-government has not hitherto been adequately acknowledged,—has been tacitly acted upon, but not expressly affirmed. The evil results of this want of recognition have finally borne fruit. Throughout the United States, the politicians in the Legislatures have more and more interfered in matters relating exclusively to subdivisions of the State,—often against the express desire of these subdivisions. It really becomes necessary, therefore, to provide in the constitutions that the Legislature shall confine itself to what concerns alike all the towns and cities of the State,—in other words, that it shall legislate by general act, reserving to the separate municipalities the control of their own affairs. We may confidently expect in future Constitutions affirmative recognition of this right to local self-government of each subdivision of the State (within the limits of its own sphere), free from control by the State except under the operation of general laws.

¹ American Commonwealth, i. 536.

Moreover, in general, we must take into consideration the steady increase of popular education that has been going on through the country since the Revolution. As education has become diffused, the difference between the mass of voters and the members of the Legislatures has diminished. Without formulating this result, the voters feel it, and hence the growth of the idea that the voters can govern themselves directly through their constitutions, rather than indirectly through their Legislatures. Bryce himself well points out¹ that because of this spread of education, and also for other reasons, the democracy of the present day is more energetic and pervasive than it was in our first generation. It is more practical, more disposed to extend the sphere of governmental interference, less content to rely on general principles. One discovers in the wording of the most recent constitutions a decline of that most touching faith in the efficacy of broad declarations of abstract human rights which marked the disciples of Jefferson. Equally pronounced, on the other hand, is the evidence of increasing faith in the efficacy of the essential principle of true democracy,—actual equality of rights. Along with the extension of this principle we see also the application of broader humanitarian principles, as well as the extension of doctrines savoring of socialism, the need of increased power in the State over the property and persons of the people, when necessary for the good of the greater number.

Looking broadly over the whole field from this point of view, we shall find that many of the provisions which at first seemed to be limitations upon the power of the Legislature are really but another means of increasing and equalizing the rights of all. Thus, provisions prohibiting the Legislature from passing special laws whenever general laws are applicable, are, after all, only checks upon the granting of monopolies and special privileges. The committal of the decision of purely local matters to the community directly interested, is more properly an extension of the principle of self-government than a restriction upon the Legislature. So the stringent provisions against granting special corporate powers are attempts to secure equal rights rather than mere restrictions upon legislative power. The substitution of biennial for annual sessions is a recognition by the people of the fact that too much legislation, like too much medicine, may impede, instead of promoting their welfare.

¹ In his vol. i. p. 439.

It was well said by Mr. Hitchcock, in his annual address to the American Bar Association in 1890, that such self-imposed restrictions are symptoms, not of the decay, but of the vigorous and healthful working of representative institutions, and are a part of the system of checks and balances characteristic of American institutions. No augury can be drawn therefrom of the decay of self-government, but rather of its perpetuity and strength. When the people of an American State deliberately impose limitations upon the exercise of their own power and that of their representatives, it is the stronger hand of a self-governing democracy which controls and guides; and such restrictions are, as James Russell Lowell has felicitously said, "but obstacles in the way of the people's whim, not of their will."

AMASA M. EATON.

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TWO BURDENS OF PROOF.

PROFESSOR THAYER'S recent article on the Burden of Proof, in which he has so lucidly traced the history of an embarrassing ambiguity in the phrase, and explained the considerations bearing on its proper use, invites further suggestion as to the essential nature of the burden. The subject is of great importance, both in procedure and in its relation to substantive law,—to procedure, because probably more verdicts are lost by misapprehension on this subject than by any other cause; and to substantive law, because it is through the burden of proof and its converse, the doctrine of presumptions, that a considerable part of substantive law gets into recognized existence.

Professor Thayer has delineated the two uses of the phrase "Burden of Proof." In jury cases there are in fact two different burdens of proof, or two different standards of the burden,—two different scales in which the burden is to be weighed. We might apply the metaphor more literally, and say two different arbiters by whom the question whether counsel has carried the burden of his case is to be determined; but then we must add that the law prescribes different tests to be applied by these different arbiters. In other words, the two senses in which the phrase is used correspond to the twofold character of the tribunal. To simplify the question, I will confine what I have to say to civil causes.

In a number of cases the judges (using general language though speaking in view of a particular case before them) have said that the burden is always on the plaintiff throughout. It ought to be observed, however, that the burden of proof is on the plaintiff only when he has invited the issue. If the only issue to be tried is one which the defendant has invited, the burden of proof is on the defendant. Thus, if the only defence is a denial, the burden of proof is on the plaintiff. If there is no denial, but an admission, express or implied, of the plaintiff's allegations, and the defence is an affirmative statement of new matter in excuse or discharge, the burden of proof is on the defendant. Let us suppose, for instance, that where there is no denial the defence consists simply of a release or an accord and satisfaction, or payment. In such case (under those systems of pleading where a failure to deny is an

admission) there is no burden on the plaintiff; and it is error to charge the jury that it is on him. The burden is on the defendant to establish his affirmative defence. This shows that there is no invariable rule that the plaintiff has the burden of proof. The burden usually is said to be on him only because he usually has the burden of the issue; and the cases which declare that the burden throughout remains on the plaintiff mean no more than that, and are consistent with saying that when the only issue is invited by the defendant, the burden of proof, by the same principle, remains throughout upon the defendant. If both kinds of issues are raised by the pleadings, the burden is on each party as to his own allegation.

Having premised this, let us take a case where the defence is a mere denial, and therefore the burden of the issue is on the plaintiff. In such a case, if the plaintiff gives no evidence his action is dismissed. If he gives evidence, the question at its close is whether that evidence is enough to support a verdict, whichever way the verdict may be; in other words, does the evidence present a question on which fair-minded men may reasonably differ. This is a question of law. If the evidence is in that condition, the plaintiff has a right to go to the jury on the question of fact; but the question whether it is in that condition does not go to the jury: the judge has to decide that before submitting the cause to the jury. If the cause is submitted to them, the question for them will be whether the plaintiff has shown sufficient to satisfy them of his right to a verdict in his own favor and against the defendant. The judge cannot decide this question. The judge weighs the proof for one purpose, and the jury for another. The judge weighs it to see that there might be a verdict either way; the jury weigh it to see which way it ought to be. If the judge sees there might be a verdict either way he submits the case to the jury, telling them that the burden of proof on the question, Which way? is on the plaintiff.

But again, before the case goes to the jury the defendant has a right to offer evidence under his denial; and after that evidence, if the judge finds that fair minds might reasonably differ, the question will go to the jury (as in the former case), with the burden of proof, usually, resting on the plaintiff. To make the distinction more clear we may call this the burden of satisfying the jury.

Let us now suppose that the plaintiff, having the burden of the issue, instead of closing with evidence merely sufficient to go to

the jury, goes on and gives sufficient, if uncontradicted, to require the judge to direct a verdict. He has now successfully carried what we may call the burden of proving to the judge, or the burden of satisfying the law. If the defendant gives no evidence the plaintiff's right is clear, and it will be error to leave the cause to the jury, even were it accompanied with an instruction that the burden of proof is on the defendant.

It is obvious, then, that proof for the judge, to make it his duty to decide the cause by directing a verdict, requires a different quantity of evidence, and therefore makes a different burden from proof for the jury. Proof for the jury requires merely a preponderance of evidence; proof for the judge requires something more: for the present purpose we may say it requires enough to dictate a legal conclusion.

To use a homely illustration, a civil jury trial may be compared to a game of shuffle-board. To adapt the illustration to the purpose, let us suppose the square divided into three fields. The first and nearest to the player is the field of mere scintillas: if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way, or may disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities.

Every practising attorney knows the successive stages of hope and of effort that he passes through in the trial of a doubtful and keenly contested cause, in which he gathers strength on the evidence as it is put in. At the opening he is not sure that he will be able to present evidence enough to go to the jury, and he bends every effort, and even takes some risks by accepting doubtful rulings, and gives the defendant some dangerous exceptions in order to get in enough evidence to entitle him to go to the jury. As his evidence accumulates, his confidence and his spirits rise, for now he hopes to get beyond the jury line, and make a case of proof for the judge, on which the judge may refuse to submit any question to the jury, and himself direct a verdict. Similarly the defendant, in his

turn, after a *prima facie* case has been made by the plaintiff, may at first hope for nothing more than to prevent the judge from directing a verdict, by adducing evidence strong enough to require submission to the jury; and in this he may even expect nothing more than a disagreement; but after he has progressed in this far enough to be confident that he has taken the cause from the judge, he begins, as his evidence accumulates, to hope to satisfy the jury; and now for the first time he says he is "going for the verdict;" and it may be in turn his fortune to feel that his evidence has carried him beyond the jury and entitled him to a direction of a verdict in his favor.

It thus becomes clear that there are two measures of proof, — one, the less, sufficient to submit to the jury; the other, the greater, sufficient to control the judge. The burden of satisfying the latter is heavier than the burden of satisfying the former.

This brings us to the question, Does either burden ever shift, and if so, which; or should we say that there is an alternation from one burden to the other?

Let us take the case of a plaintiff whose evidence raises a presumption of law in his favor. He has carried his burden, and "the burden of going forward with the case" now devolves upon the defendant. The defendant has the same alternative before him which the plaintiff had. He may give such overwhelming evidence against the plaintiff's case as to require the judge (unless the plaintiff reinforces his case by further evidence) to direct a nonsuit or a verdict, or he may give only sufficient evidence to bring the plaintiff's case into doubt, and thus leave the cause with the jury. It appears thus that the burden which the defendant takes up, although of the same nature as that which the plaintiff took up in the first instance, does not necessarily require the same measure of proof as was furnished by the plaintiff. The plaintiff took up the burden of proving either to the judge or to the jury. But it was because the plaintiff succeeded in proving to the judge that the defendant had in turn the burden of proving something; and he has the same alternative of proving to the satisfaction of either.

It is when the evidence of both parties is in, and the case is to be given to the jury, that the question of proving to the jury is raised by itself alone.

Again, the two senses of burden of proof have some analogy to the two classes of presumptions, — presumptions of law and presumptions of fact.

To make the jury the arbiter of whether the burden of proof is successfully carried, the cause must, at its close, involve some question of fact. If the evidence is presumptive, then, in order to have that effect, an essential part of it at least must be a presumption of fact. If no essential part of presumptive evidence is a presumption of fact, then it follows that a presumption of law is involved, and a presumption of law, if unrebutted, is sufficient to determine the cause ; and this is a question for the judge, and cannot go to the jury. To make the application of this more clear, let us call the presumptions of fact, inferences or permissible presumptions ; that is to say, presumptions which *may be made or not*, according to the opinion of the jury, as distinguished from legal presumptions which *must* be made, and must be made *by the judge* if asked. Considered with reference to their effect on the trial, presumptions may be thus described. A conclusive presumption binds the party, the judge, and the jury. A rebuttable legal presumption binds only the judge and the jury. A presumption of fact, or, as I will call it, a permissible presumption or an inference, is only for the jury. But neither a conclusive nor a rebuttable presumption binds if the minor premise is rebutted. A conclusive presumption is one which can only be met by rebutting the minor premise. A rebuttable presumption is one that may be met either by rebutting the minor premise, or by rebutting the conclusion with or without attempting to rebut the minor premise. A presumption of fact may be met by rebutting either the major premise or the minor premise, or the conclusion, indifferently ; and to rebut either is enough. Thus, in those jurisdictions where a seal is held conclusive evidence of consideration, if the plaintiff gives in evidence an obligation with a seal, the defendant can only repel the conclusion of consideration by rebutting the evidence of the validity of the sealed instrument ; that is to say, the legal existence of a seal of the defendant. But if a statute exists, as in some jurisdictions declaring a seal only presumptive evidence of consideration, the presumption is thereby made rebuttable, and the defendant may now concede the seal, and yet rebut the conclusion by direct evidence that in fact there was no consideration, seal to the contrary notwithstanding. If under either state of the law the plaintiff by proving the seal raises a legal presumption of consideration, he thereby makes (if that be the only question in the cause) a case on which, in the absence of evidence on the defendant's part, the judge must direct a verdict. Now, if the defendant meets the pre-

sumption, whether conclusive or rebuttable, by evidence attacking the minor premise, — namely, by contradicting the evidence that the instrument was the defendant's bond, — he is entitled to go to the jury; and the jury must be instructed that the burden is on the plaintiff to prove to their satisfaction, by a preponderance of probability, that it was the defendant's bond. If they find that it was, the conclusion is inevitable, that there was a consideration: in the first case (*i. e.*, the case of a conclusive presumption), because the defendant cannot deny the conclusion; in the second case (*i. e.*, in the case of a rebuttable presumption), because by the supposition he has only sought to disprove the making of the bond, and has given no evidence that, conceding the seal, there was no consideration in fact. In the absence of such evidence the seal is sufficient as matter of law. Hence, if the evidence of the defendant has controverted the premise, the burden is on the plaintiff to establish the premise; for, without that premise, he has no right to invoke the presumption.

In case, however, the presumption is only rebuttable, the defendant may, without attacking the premise, attack the conclusion by direct evidence; and where he does so, since he thus has conceded the premise, there is an acknowledged legal presumption against him, unless he succeeds in satisfying the jury that the conclusion ought not, in this case, to follow.

This brings us to the point on which the authorities, as to burden of proof for the jury, are in conflict. Some cases are in accord with the principle that if the premise is established by uncontroverted and unimpeached evidence, and the opposing evidence only controverts the conclusion, the jury may be told that the burden is shifted to the defendant to overcome the presumption. Other cases require us to recognize a contrary principle; viz., that if the defendant, even while tacitly conceding the premise of a legal presumption against him, gives evidence controverting the conclusion, the whole matter is set at large, and the jury must be instructed that the burden is on the plaintiff throughout.

So far, therefore, as the principles of logic are alone a safe guide, we find the following rules. At the outset the plaintiff has the burden of proving his case, — to the judge as matter of law, or to the jury as matter of fact. If he does not satisfy the judge as matter of law, the cause goes to the jury, with the instruction that the burden is on the plaintiff throughout to satisfy the jury.

If he does satisfy the judge in the first instance, it is proper for

the judge to say, as a guide to himself, that the burden of proof has shifted to the defendant, and if the defendant give no evidence, he must decide for the plaintiff ; but it is not proper for him to say so to the jury, unless the cause goes to the jury ; and by the supposition it cannot go to the jury unless the defendant gives evidence. If then the defendant does give evidence, the question whether the judge may, in submitting the cause to them, say the burden is on the defendant, depends on what the defendant's evidence is. If the plaintiff relies on presumptive evidence, and the defendant carries the cause to the jury by throwing doubt on the premise on which the plaintiff relies, the burden of proving to the jury rests on the plaintiff throughout. If the defendant carries it to the jury by throwing doubt on the conclusion without attacking the premise, logical principles would suggest that the burden of proving to the jury rests on the defendant, and that in such a case it would be proper to give the jury a binding instruction as to the premise, and tell them that the burden of proof as to the conclusion had shifted to the defendant. The essential cause of the shifting was the plaintiff's having established a rebuttable presumption, the premise of which the defendant has not questioned.

If we examine the principal cases on the question of saying to the jury that this burden has shifted, to see whether these principles are in effect to be found in actual operation, we shall find no little confusion. Some favor the view that if a rebuttable presumption is attacked by opposing the conclusion only, without questioning the premise, the burden still remains on the plaintiff. Upon this view a rebuttable presumption of law sinks into a mere presumption of fact if the conclusion is contradicted by evidence, even though the premise be uncontradicted. Other cases can be clearly explained and fully justified if it be sound to hold that, if the defendant seeks to overthrow a legal presumption by contradicting the conclusion without contradicting the premise, the jury may properly be told that unless the preponderance of probability as to the conclusion is in the defendant's favor, the jury should give effect to any presumption drawn by the law from uncontradicted and unimpeached testimony.

I note below a few familiar cases in a way to illustrate the logical question in respect to the effect of a legal presumption. It will doubtless be found that whatever principle we apply, there will be some incompatibility in the cases.

The main point, which it is my object to make clear, is that

the old maxim, that questions of fact are for the jury, not for the judge, is no longer true; and that to bring a question of fact within the arbitrament of the judge, so that he can say the burden has shifted for the purpose of guiding his decision, requires a different measure of proof from that necessary to give the question to the jury, and allow him to tell them that the burden has shifted, for the purpose of guiding their decision; that in the former, as in the latter case, it is, strictly speaking, a burden of proof, not merely a burden of going forward with the evidence; and there are, therefore, two burdens of proof, of different weight and for different purposes.

AUSTIN ABBOTT.

Powers v. Russell, 13 Pick. 69.—Bill in equity to redeem. The plaintiff sought by secondary evidence to prove a deed sworn to have been lost at the time of trial. He relied on evidence that it was attested by witnesses and acknowledged, and produced a copy, but gave no other evidence of delivery. The defendant relied on evidence that the deed remained in possession of the grantor, and that the grantee was not present at its execution. This evidence was submitted to the court subject to exception as to its competency.

For the plaintiff it was argued that he had made out a *prima facie* case, and therefore the burden was on the defendant to show non-delivery. *Held*, not so; but the burden remained on the plaintiff through the whole inquiry. Shaw, C. J., said: "Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such *prima facie* case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still, the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate.

"But where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact.

"To illustrate this: *prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side tending to negative such fact of delivery; this latter is met by other evidence; and so on through a long inquiry. The burden of proof has not

shifted, though the weight of evidence may have shifted frequently, but it rests on the party who originally took it. But if the adverse party offers proof, not directly to negative the fact of delivery, but to show that the deed was delivered as an escrow, this admits the truth of the former proposition, and proposes to obviate the effect of it by showing another fact, namely, that it was delivered as an escrow. Here the burden of proof is on the latter.”¹

Burnham v. Allen, 1 Gray, 496.—In this case it seems to be clearly held that although the burden is on the defendant (and the jury may be so instructed) to establish an affirmative defence set up, the plaintiff does not, by producing a promissory note expressed to be for value received, throw the burden on the defendant of giving sufficient evidence to rebut the presumption of law that there was a consideration. The opinion, by Chief Justice Shaw, holds that the note raises a presumption of consideration, but appears to leave the burden on the plaintiff to satisfy the jury on the whole evidence that there was a consideration, even if the defendant does not attack the note which was the premise of the legal presumption, but only gives other evidence to rebut the conclusion of consideration given, or tending to show its failure. It is to be observed, however, that the distinction is not clearly made, and the language, both of the charge which was approved, and of the paraphrase given by the Chief Justice, is not inconsistent with the rule I have suggested. The court say, “When in the above sentence the learned judge used the phrase, ‘unless the defendant introduced evidence,’ we understand him to mean, as above stated, that after the production and proof of the signing of the note, and after thus establishing a *prima facie* case, the plaintiff would be entitled to a verdict, unless the defendant could show, from the whole evidence, want or failure of consideration, or leave the proof so doubtful as to enable the jury to say that the plaintiff had not satisfactorily proved a consideration”²

¹ This case was before the court sitting as jury as well as in capacity of judges. It therefore agrees with the cases that hold it error, when a question is submitted to a jury, on a conflict of direct evidence, to tell them that the burden has shifted by virtue of the evidence on one side. But it is also entirely consistent with the proposition (which indeed it directly concedes) that if the defendant gives no evidence to rebut a fact supported by the plaintiff's evidence, but relies wholly on another fact consistent therewith, and intended merely to avoid the resulting legal effect, the burden is on the defendant to establish it.

² This certainly leaves the burden on the defendant to satisfy the jury of something, either that the fact was as he claimed, or that the fact alleged by the plaintiff was left in doubt. This case has always been understood by the profession as holding that where the defendant merely rebuts the conclusion of a rebuttable presumption, without questioning the premise, he assumes no burden of proof; but the burden remains on the plaintiff; and if the rebutting evidence leaves the conclusion balancing in doubt, the plaintiff cannot prevail.

Central Bridge Co. v. Butler, 2 Gray, 130.—Assumpsit for tolls; general issue. The plaintiffs made a *prima facie* case by proving that the defendant crossed the bridge, which raised a presumption that he was within the general rule of liability. The defendant gave evidence of other persons being allowed to cross free to reach the same lands, and he claimed the right to do so under a vote of the plaintiff corporation giving free passage to those lands. The question seems to have been presented by an exception to the admission of this evidence offered by the defendant, and to the refusal to rule on the contrary that the plaintiff's evidence made a *prima facie* case, and threw the burden on the defendant, which the defendant could not meet by proving an exception he had not alleged. *Held*, that although evidence of passing without paying made a *prima facie* case, the exception was proper matter in contradiction, and was not an affirmative defence. The court say, "The defendant did not aver any new and distinct fact, such as payment, accord and satisfaction, or release, but offered evidence to rebut this alleged legal liability. By so doing he did not assume the burden of proof."¹

Noxon v. DeWolf, 10 Gray, 343.—Action of contract: indorsee of notes against maker. The plaintiff relied on the notes, with undated indorsements, as showing that he took in good faith for value before maturity. The defendant relied on indirect evidence that the note remained in the payees' hands till after maturity, and on his equities against the payees. The judge left to the jury the single question of the plaintiffs' taking before maturity, etc.; told them that the presumption from the notes themselves was that they were indorsed at date; that if they were shown to have been in the payees' hands after that date, the presumption continued that they were indorsed before due; "and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they still belonged to the payees." *Held*, not error. The court say: "It may be that under the more precisely accurate use of the term 'burden of proof,' as now held by the court, it would have been more correct to say that upon the production by the holder of a negotiable promissory note, indorsed in blank, the legal presumption is that it was indorsed at its date; and it is incumbent on the defendants to overcome that presumption by evidence. This must have been so understood in the present case, as the plaintiff had already produced a note thus indorsed; and the question was upon the effect of the testimony offered to show the fact that it was indorsed after overdue. Upon such a state of the case, it was the duty of the defendants to offer sufficient evidence to

¹ This case also has always been understood as holding that the defendant has no burden of proving anything to the satisfaction of the jury, except as he relies on new matter, not merely controverting the plaintiff's case,

control the legal presumption arising from the indorsement of the note. In this sense the burden was on the defendants."¹

Morgan v. Morse. 13 Gray. 150. — Action of contract for price of goods sold. The auditor to whom the cause was referred, reported for the plaintiff, who put the report before the jury, and rested. The defendant relied on evidence tending to contradict the report. *Held*, not error to instruct the jury "that the burden of proof was on the defendant to overturn or control the reports." Biglow, J., said: "This mode of using the phrase, though somewhat loose and inaccurate, is quite common, and where not improperly applied to a case so as to confuse or mislead the jury, cannot be held to be a misdirection. *Powers v. Russell*, 13 Pick. 76; *Delano v. Bartlett*, 6 Cush. 368. In this sense it was manifestly used in the present case. The attention of the court was not called to the distinction between that evidence which was sufficient to impeach and overcome a *prima facie* case, and that which was necessary to sustain the issue on the part of the plaintiff. No instruction was asked by the defendant upon this subject. It would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict, unless it was impeached and controlled by the evidence offered by the defendant. But we see no reason to believe that the instruction given was not properly understood, or that the defendant was in any way aggrieved thereby."²

Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271; reversing 2 Daly, 454. — Action against carriers for loss of goods. It appeared that the bill of lading exempted the defendant from liability for fire. The defendant proved loss by fire, but the court ruled that to go to the jury they must also disprove negligence. After they gave evidence for that pur-

¹ In this case, the plaintiff raised a legal presumption on which the court could not have given the case to the jury, had not the defendants given evidence to rebut the presumption. The evidence which they gave raised at best only a presumption of fact. The court therefore should give the question to the jury, and properly instructed them that the legal presumption bound the jury, unless the defendant had controverted it to their satisfaction; and that if the question on the defendant's evidence (as I understand the charge) rested in doubt, they must find for the plaintiff. This tends to support the proposition that where the conflicting evidence on a question submitted to the jury consists of a presumption of law raised by the party having the burden of the issue, met only by a contradiction of the conclusion, or only by evidence sufficient to raise a presumption of fact, the jury may be instructed that the burden is on the defendant to establish his rebuttal of the adversary's legal presumption, and that if he does not do so, the jury are bound by that legal presumption.

² Here the plaintiff by the report raised a presumption of law. The opposing evidence given by the defendant raised only a presumption of fact. The court properly instructed the jury that in the absence of evidence contrary to the conclusions of the report, they were bound by the presumption of law in its favor, and that the burden was on the defendant to contradict it.

pose, the court submitted the case to the jury, instructing them in effect that the burden was on the defendant to show absence of negligence. *Held*, error. The defendant was exonerated as carrier by the contract. Relieved of this responsibility, it was liable only as a bailee for hire, and the bailor in such case must show negligence. Grover, J., added: "It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence which, uncontradicted, proves the fact alleged by him. It has, in such cases, frequently been said that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this, and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases the party holding the affirmative is still bound to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury, affirmatively, of the truth of the fact alleged by him, or he is not entitled to a verdict. In the present case, to entitle the plaintiff to recover, he was bound to prove that the fire which consumed the cotton, resulted from the negligence of the defendant."¹

Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; affirming 56 Barb. 425. — Negligence, for injuring a passenger. The plaintiff's evidence showed a case, which, under the rule as to carriers by steam, raised a legal presumption of negligence. The defendant's evidence (which is indicated in the opinion of the court below) tended, without contradicting the plaintiff's evidence, to contradict the conclusion of negligence, by showing the care of the engineers. *Held*, not error, in the course of charging the jury, to say that "the burden of disproving negligence is on the defendant." The court, per Church, C. J., said: "This was preceded by the remark that 'the fact that the plaintiff was injured by the escape of steam from the boiler raises the presumption that the defendant was negligent.' So that the jury must have understood the remark first quoted as referring to the burden cast upon the defendant by the plaintiff's evidence. In another part of the charge, as to negligence in the management of the boiler on the occasion of the accident, the judge said: 'The defendant must show there was not any negligence, otherwise it failed.' But added: 'The burden of proof relieving itself of the charge of negligence, after proof of the explosion, rests properly and justly

¹ This case, though often cited for the proposition that the burden never shifts, really turned on the sufficiency of the defence to the action, considered as an action against carriers, and the necessity of the plaintiff's proving negligence to sustain his case as an action against an ordinary bailee. There seems to be nothing in the decision inconsistent with the logical analysis of principles, nor with the cases stated below.

upon the defendant, because it must be presumed to have the means within its control of showing how its property was constructed and managed.'

"This conveyed to the jury the correct rule, that the presumption arising from the plaintiff's proof, unless overthrown by the evidence produced by the defendant, must prevail."¹

Seyboldt v. N. Y., Lake Erie, &c. R. R. Co., 95 N. Y. 568.—Negligence in the carriage of a passenger. The plaintiff gave evidence of circumstances of casualty, which under the rule as to carriers by steam raised a legal presumption of negligence, and these circumstances were not contradicted by the defendants' evidence. The defendants proved other circumstances relied on to show due care on their part. *Held*, not error to refuse to charge that the burden was on the plaintiff. Ruger, C. J., said: "When this request was made, the evidence had clearly raised a presumption of negligence against the defendant, and the only question relating thereto which remained for the jury to consider was whether this presumption had been sufficiently negatived by the evidence introduced by the defendant. Under the authorities cited, it would not have been error even if the court had charged that the plaintiff had established a *prima facie* case; and the burden of explaining the cause of the accident then rested upon the defendant."

¹ This ruling is consonant with the logical principles I have above suggested.

THE LIABILITY OF THE MAKER OF A CHECK AFTER CERTIFICATION.¹

IN the past five years a number of articles on the law of certified checks have been printed in law periodicals. Among them are one by W. H. Bryant, in 27 *American Law Register*, N. S. 141, and one by W. F. Elliott, in 31 *Central Law Journal*, 373. Besides these, there is an able discussion of the legal questions involved, in the third edition of *Morse on Banks and Banking*, chapter xxx., printed in 1888; and in 1887 the important case of *Born v. First National Bank of Indianapolis*² was decided.

The conclusion reached in this case and by the above mentioned authors, that, if a check be certified at the instance of the maker, he is not discharged, appears to the present writer to be erroneous. The question is a narrow one, but of vital importance to the commercial world; and its solution should be placed, if possible, on broad and scientific principles of mercantile law, so that there may be no question as to its correctness.

No one in giving a check, whether certified or not, makes any representation as to the solvency of the bank, and the only case in which the question of the liability of the maker of a certified check can arise is in the event of the bank's insolvency.

If a check were a bill of exchange, there would be no question as to the maker's liability. But it is settled beyond all hope of dispute or shadow of controversy that a check, although analogous in many respects to a bill of exchange, is not a bill of exchange. Indeed, after a careful investigation of the subject, it is said in *Morse on Banks and Banking* (3d ed.), § 380: "To our mind the differential traits decidedly preponderate; and the more correct method is to treat the check as an altogether independent and distinct instrument from the bill of exchange." Chancellor Kent has pointed out some of the differences, saying:

"A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a check is not a surety, but the principal

¹ This article was written before the case of *Minot v. Russ*, 31 N. E. Rep. 487, was decided.

² 123 Ind. 78.

debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of the banker."¹

And Mr. Justice Story, delivering judgment in *In the Matter of Brown*, has expressed in the strongest terms his opinion that a check is not a bill of exchange, saying, —

"I am aware that Mr. Justice Cowen, in his elaborate opinion in *Harker v. Anderson*,² has endeavored to support the opinion that a check is to be deemed, to all essential purposes, to be a bill of exchange, and, therefore, that all the rules applicable to the latter are of equal force in relation to the former. Notwithstanding the array of authorities, so fully and learnedly brought forth by him in support of that opinion, my own judgment is that they wholly fail of the purpose. It appears to me to be a struggle on the part of the learned judge to subject all the doctrines, applicable to all negotiable instruments, to some common and uniform standard. I hope and trust that such an effort will never prevail. In my judgment, it is far better that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience and to mould themselves into the common habits of social life, than to assume any artificial forms, or to regulate by any inflexible standard the whole operations of trade and commerce. As new instruments arise in the course of business, they should be construed so as to meet and accomplish the very purposes for which they were designed by the parties, and not to defeat them. Checks are as well known now as bills of exchange, as a class of distinct instruments in commercial negotiations, and he who seeks to make them identical in all respects with bills of exchange may unintentionally be introducing an anomaly instead of suppressing one. Upon the whole, my judgment is precisely in coincidence with that of Mr. Chancellor Kent."³

And again: "The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me) that they are always drawn on a bank or banker; that they are payable immediately on presentment, without allowance of any days of grace; and that they are never presentable for mere acceptance, but only for payment."⁴

To the same effect is *Merchants' Bank v. State Bank*.⁵

¹ 3 Kent, Com. (13th ed.) 104, n.

² 2 Story, 512.

³ 21 Wend. 372.

⁴ 10 Wall. 604.

⁵ 2 Story, 502, 517, 518.

The following further differences between bills of exchange and checks have been adjudicated : —

A bill of exchange must be duly presented to the drawee for payment, in order to hold the drawer, whereas the drawer of a check, even if it is not duly presented, is still liable on it, unless he has been prejudiced by the delay.¹

A check was not within the first section of the Act of Congress of July 6, 1797, 1 U. S. Stat. 527, requiring bills and notes to be stamped.²

At common law the oral acceptance of a bill of exchange was good,³ but the oral acceptance of a check is not a certification.⁴

The death of the drawer of a bill of exchange has no effect upon the duties, liabilities or rights of the other parties to it, but the death of the drawer of a check revokes it.⁵

The purchaser of an overdue bill of exchange takes it subject to all equities. With regard to checks there is no such rule.⁶

In *London & County Banking Co. v. Groome*,⁷ the plaintiff had received the check, eight days after its date for collection. It was payable to bearer, and had been given to the plaintiff's depositor, who had deposited it for collection in violation of an agreement to hold and use it only as collateral security. The defendant was the maker.

Mr. Justice Field said, —

"That the holder of an overdue bill or note payable at a fixed date (appearing of course upon it) is in the position suggested [subject to all equities] is established beyond all doubt; and the reason of the rule is, that inasmuch as these instruments are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circum-

¹ *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, 3 C. B. N. S. 442; *Keene v. Beard*, 8 C. B. N. S. 372, 381; *Kinyon v. Stanton*, 44 Wis. 479. Note by Professor Ames to *Robinson v. Hawksford*, 2 Ames Bills and Notes, 729.

² *Conroy v. Warren*, 3 Johns. Cas. 259.

³ *Pierce v. Kittredge*, 115 Mass. 374.

⁴ *Morse v. Massachusetts National Bank*, 1 Holmes, 209; *Bank of Springfield v. First National Bank*, 30 Mo. App. 271; *Farmers' and Traders' Bank v. Bank of Allen County*, 12 S. W. Rep. 545; *Espy v. Bank of Cincinnati*, 18 Wall. 604, 620, 621; 2 Ames Bills and Notes, 802, § 11.

⁵ *In re Mead*, L. R. 15 Ch. D. 651; *In re Beak*, L. R. 13 Eq. 489; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Tate v. Hilbert*, 2 Ves. Jr. 111, 115, 118; s. c. 4 Bro. C. C. 286.

⁶ *London & County Banking Co. v. Groome*, 8 Q. B. D. 288; *Boehm v. Sterling*, 7 T. R. 423; *Rothschild v. Corney*, 9 B. & C. 388.

⁷ 8 Q. B. D. 288.

stance is sufficient of itself to excite so much suspicion that, as a rule of law, the indorsee must take it on the credit of, and can stand in no better position than, the indorser.¹ But with regard to checks no such rule has been laid down."²

But the greatest difference between a check and a bill of exchange lies in the fact that, when a bill of exchange is accepted by the drawee, the drawer is still secondarily liable; whereas, if the payee or subsequent holder of a check presents it to the bank for certification, and it is certified, the maker is no longer liable at all. Certification of a check is, therefore, something different from and more than the acceptance of a bill of exchange.

This is the rule of law in every jurisdiction where the question has arisen or been referred to.³

In *Metropolitan National Bank v. Jones*,⁴ which is the latest case on the subject, the plaintiff brought an action on a check which had been given to it by the defendant, and of which the plaintiff had procured certification. Mr. Justice Bailey, delivering the opinion of the court, said, —

"A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfil its duty to its depositor only by paying the amount demanded. . . . It follows that there is no such thing as 'acceptance' of checks in the ordinary sense of the term, for 'acceptance' ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee 'accepts' to do so, thereby becoming principal debtor, and the drawer becoming his surety. . . . By certification, the bank enters into an absolute undertaking to pay the check when presented at any time within the period prescribed by the Statute of Limitations. The transaction, as between

¹ *Brown v. Davies*, 3 T. R. 80.

² 8 Q. B. D. 288, 292.

³ In *Warrensburg Co-operative Association v. Zoll*, 83 Mo. 94, the check was presented by the payee to the assignee of the bank, after the bank had closed its doors, and was "accepted." It was, therefore, not certified in the regular course of business, but was merely the allowance of a claim against the insolvent bank, since in Missouri a check operates as an assignment. *State Savings Association v. Boatman's Savings Bank*, 11 Mo. App 292. Consequently that case has nothing to do with certification.

Boyd v. Nasmith, 17 Ontario, 40; *First National Bank v. Leach*, 52 N. Y. 350; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193; *French v. Irwin*, 4 Baxt. 401; *National Commercial Bank v. Miller*, 77 Ala. 168; *First National Bank v. Whitman*, 94 U. S. 343, 345; *Born v. First National Bank of Indianapolis*, 123 Ind. 78, 79; *Metropolitan National Bank v. Jones*, 12 L. R. A. 492.

⁴ 12 L. R. N. 402.

the holder and the bank, is substantially the same in legal effect as though the holder had received payment and had deposited the money with the bank and received a certificate of deposit therefor. . . . Another result of the transaction is that the bank thereby becomes entitled to, and if its business is properly conducted actually does, charge the amount of the check to the account of the drawer at the time of the certification; thus in reality appropriating to the payment of the check the necessary amount of the money on deposit to the credit of the drawer, precisely the same as though the check were paid. As between the bank and drawer, certification has the same effect as payment, the funds representing the amount of the check being just as effectually withdrawn from the control of the drawer. . . . The question whether this change in the rights and relations of the parties should be held to discharge the drawer from further liability on the check has not, so far as we are aware, ever been before this court for decision; but the great weight of authority as found in the decisions of courts of other jurisdictions, and in the treatises of law writers of the greatest learning and ability, is in favor of the conclusion that the drawer is discharged. . . .¹

"It seems to us very clear, both upon principle and authority, that the plaintiffs in this case, by obtaining certification of their check, discharged the defendants from all liability thereon as drawers."²

In *First National Bank v. Leach*,³ where the plaintiff likewise sought to recover from the drawer of a check, which had been certified at the request of the plaintiff, Mr. Justice Peckham, in delivering the opinion of the Court, said, —

"The theory of the law is that where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself. The reason therefor is so strong that the law presumes it is adopted by the banks. . . .

"It follows that after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

"If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check, instead of making a certificate of its being good."⁴

It is obvious, therefore, that the certification of a check is not in any way analogous to the acceptance of a bill of exchange, to

¹ 12 L. R. A. 494.

² 12 L. R. A. 495.

³ 52 N. Y. 350.

⁴ 52 N. Y. 351, 352.

which it has sometimes been loosely likened. Certification, instead of creating an additional obligation on the check itself, creates an entirely new instrument, superseding the check altogether, by reason of which the prior parties to the check are wholly discharged.

It being established that, when the holder procures the certification of a check, the maker thereof is discharged, and the reason for the rule being that the maker has lost all control of his funds to the amount of the check, and the holder has obtained a new obligation that is inconsistent with the nature or purpose of a check, it is obvious that the reason applies with equal force to the case where the maker himself procures the certification before he delivers the check to the payee. The payee in such a case takes the check solely on the obligation of the bank. A certified check is in all cases a promissory note of the bank, and has ceased to be a check at all. In other words, a certified check is a substituted obligation, the result of a novation, by which the maker is discharged. The holder or payee impliedly says, "Give me the promise of the bank, and I will discharge you;" and the maker says to the bank, "Promise the payee, and I will discharge you *pro tanto*." The check is necessarily thereby extinguished. As has been said in numerous cases, a certified check is the same as a certificate of deposit, and it is nothing more.

It seems, therefore, to be the settled law that, if the payee or any subsequent holder procures the certification, the maker is discharged. For those learned courts, which have held that if the maker procured the certification himself, he was not discharged, have admitted, when their attention was called to it, that if the payee had procured the certification, he would have discharged thereby the maker. Moreover, although the first cases on this subject arose in Illinois in 1866, — *Bickford v. First National Bank of Chicago*,¹ *Rounds v. Smith*,² — and were to the effect that the maker, where he had procured the certification himself, was not discharged, there is but one decision of any importance, *Andrews v. German National Bank*,³ that holds the same doctrine, until that of *Born v. First National Bank of Indianapolis*,⁴ in 1887. The intervening decisions are *Brown v. Leckie*,⁵ in 1867, *Mutual National Bank v. Rotgé*,⁶ in 1876, and the ruling of Mr. Justice

¹ 42 Ill. 238.

² 42 Ill. 245.

³ 9 Heisk. 211.

⁴ 123 Ind. 78.

⁵ 43 Ill. 497.

⁶ 28 La. An. 933.

Depue at *nisi prius*, in New York, Lake Erie, & Western R. R. v. Smith,¹ in 1881. Whereas in 1873, the Court of Appeals of New York held that the maker was discharged, when the payee procured the certification, in First National Bank v. Leach,² and there Mr. Justice Peckham, delivering judgment, intimated the opinion that the maker would not be discharged, if he had procured the certification himself. In 1874 French v. Irwin³ was decided, in which the Court of Tennessee reached the same conclusion as was reached in First National Bank v. Leach,⁴ and in 1876 the Circuit Court of the United States for the District of Illinois decided a case in accordance with the same doctrine.⁵ In the same year the Supreme Court of the United States stated the rule that the maker was discharged, if the certification were procured by the payee, as settled law, and intimated an opinion that there was in reality no difference between such a case and the case where the maker himself procured the certification.⁶ In 1889 came the important case of Boyd v. Nasmith,⁷ and in 1891 the still more important decision in Metropolitan National Bank v. Jones,⁸ in both of which it was held that the maker was discharged by the payee having procured the certification of the check.

There are, however, seven jurisdictions, in which it has been ruled that the maker, having procured the certification, was not discharged; and in New York a like opinion has been expressed, *obiter*, by an eminent judge.⁹

But the reasons given for the conclusion reached in these cases are by no means satisfactory; and a review of them will show, I think, that they have been placed on no tenable ground, on which to distinguish them from the cases, where the payee has procured the certification, and where it is universally held that the maker is discharged.

¹ 4 N. J. L. J. 34

² 52 N. Y. 350.

³ 4 Baxt. 401.

⁴ 52 N. Y. 350.

⁵ Essex County National Bank v. Bank of Montreal, 7 Biss. 193.

⁶ First National Bank v. Whitman, 94 U. S. 343, 345.

⁷ 17 Ontario, 40.

⁸ 2 L. R. A. 492.

⁹ Bickford v. First National Bank of Chicago, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Larsen v. Breene, 12 Col. 480; New York, Lake Erie, & Western R. R. v. Smith, 4 N. J. L. J. 34; Andrews v. German National Bank, 9 Heisk. 211; Cincinnati Oyster & Fish Co. v. National Lafayette Bank, 4 Oh. C. C. 135; Mutual National Bank v. Rotgé, 28 La. Ann. 933; First National Bank v. Leach, 52 N. Y. 350, 353; Born v. First National Bank of Indianapolis, 123 Ind. 78.

The first of these cases, in point of time, are those in Illinois. *Bickford v. First National Bank of Chicago*¹ was decided on the distinct grounds that a certified check was not money, — a proposition which no one will deny, — and that a check was like a bill of exchange. Mr. Justice Brëese said: "The question is fairly presented, whether the receipt of a certified check is of itself payment, or whether a check, upon being certified, ceases to be commercial paper and becomes money."²

It is submitted that this is not the question at all. The question is whether, by the novation, the drawer is not discharged; and it is again submitted, with all deference, that he is.

Again, Mr. Justice Breese says,—

"If, then, a check, certified or not, is like an inland bill of exchange, the drawer of this check, the appellant here, undertook on his part that the drawee, Conrad, should accept and pay, and Conrad so most emphatically promised by certifying it; and as he did not pay, the drawer is answerable, he having due notice of the non-payment. . . . Although it be the fact that certified checks pass from hand to hand as cash, still they are not cash or currency in the legal sense of those terms, and they do not lose on that account any of their characteristics as bills of exchange. . . . As the acceptance of a bill of exchange does not discharge the drawer, so neither should the acceptance of a check, manifested by the word 'good' placed upon it by the bank, discharge the drawer."³

And, as is pointed out in *Essex County National Bank v. Bank of Montreal*,⁴ this conclusion was also largely induced by the peculiar rule obtaining in Illinois, that a check operates as an assignment *pro tanto* of the maker's funds in the bank.⁵ Such a rule cannot be supported on principle, and is contrary to the weight of authority.⁶

The other two Illinois cases and the case in Colorado⁷ simply follow this first Illinois decision, the reasoning of which has been entirely refuted by the recent case of *Metropolitan National Bank v. Jones*.⁸

In *Andrews v. German National Bank*,⁹ a check is held to be in all things a bill of exchange, and certification to be only acceptance. But this reasoning is inconsistent with the later case of

¹ 42 Ill. 238.

³ 42 Ill. 243, 244.

² 42 Ill. 240.

⁴ 7 Biss. 193, 199.

⁵ *Munn. v. Burch*, 25 Ill. 35.

⁶ *Carr v. National Security Bank*, 107 Mass. 45.

⁷ 12 Col. 480.

⁸ 12 L. R. A. 492.

⁹ 9 Heisk. 211.

French *v.* Irwin,¹ in which it was held that the drawer was discharged by the certification of the check at the instance of the payee; and the controlling reason for the decision, namely, that a check was nothing but a bill of exchange, has been shown to be erroneous.

In *Cincinnati Oyster & Fish Co. v. National Lafayette Bank*,² Mr. Justice Smith said that certification is a means adopted "to satisfy those into whose hands it may come that the drawer has funds in the bank appropriated to the payment of the same. . . . In such case there is no arrangement between the holder of the check and the bank on which it was drawn, either express or implied, that he is to look to the bank alone. . . . The person so receiving it has an additional security for its payment."³

And for these reasons the maker was held liable.

It is obvious that the learned judge did not rightly understand the operation of certification. He entirely lost sight of its real effect, and simply reached the conclusion by saying what a certified check was not.

In the New Jersey and New York cases, above cited, so far as appears, they have no reasons for holding the maker liable. And in the brief report of the ruling at *nisi prius* of Mr. Justice Depue,⁴ it is extremely doubtful whether the certification of the check was not procured by the payee, in which case there can be no doubt that the learned justice was mistaken as to the law. The words of the report are: "The check was given the agent of the company [the payee and plaintiff] in Newark, and was on the First National Bank. It was certified, and then, under the rules of the company, transmitted to them in New York."

In the Louisiana decision, *supra*, the indorsers, who had procured the certification, were held liable because the learned court could think of no ground on which they could be discharged, and no prior cases are cited.

In *Born v. First National Bank of Indianapolis*,⁵ Mr. Justice Elliott, speaking for the Supreme Court of Indiana, said,—

"We agree with the appellant's counsel that the drawer of a check is released, if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes in his hands

¹ 4 Baxt. 401.

² 4 Oh. C. C. 137

⁵ 123 Ind. 78.

² 4 Oh. C. C. 135.

⁴ 4 N. J. L. J. 34.

substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor

"The principle which gives force and strength to the decisions referred to [*i. e.*, when the holder procures the certification] fails entirely, when there is no act done by the holder of the check, save that of receiving it in the form in which it is presented, for the element which sustains those decisions is, that the holder, by procuring the certification of the check, after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer."¹

The above quotations from the opinion, and the additional proposition that certification is not an assurance that the bank is solvent, are the grounds upon which the case was decided. And in reaching the conclusion, the court were strongly impelled by the hallucination that they would be making a check equivalent to money, if they held that the drawer was discharged. No suggestion is made of any legal difference between the case decided and the case, in which it is admitted that the drawer would be discharged, where the holder procures the certification himself. Of course, the latter is the stronger case, for there is an additional argument in reaching the conclusion than in the former case, in that the payee has done an act himself. But the legal effect of certification must be the same in all cases. In one instance, a certified check cannot be a new instrument substituted for the check, a promissory note of the bank, with all the legal results attending it, and in the other, the old obligation, an entirely different instrument, with the original rights and liabilities; for on their face they are both the same instrument, a certified check, and it would be impossible for an indorsee to know what obligation he was buying. Unless there is some valid reason for making such a distinction, it clearly should be avoided; for it would open the door to fraud, confusion and injustice. The indorsee of a check would be compelled to bring suit against the maker before he could ascertain what rights he had.

Opposed to these seven jurisdictions is a *dictum* of the Supreme Court of the United States in *First National Bank v. Whitman*,² where Mr. Justice Hunt, delivering judgment for the court, said:

¹ 123 Ind. 79, 80.

² 94 U. S. 343.

"Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance."¹

Without standing as sponsor to all the sentiments or lurid and bad English contained in a communication to the Central Law Journal relative to *Born v. First National Bank of Indianapolis*,² I quote the material part of it to show the strong feeling that exists that that case was wrongly decided:—

"We think the reasons assigned in this opinion for this distinction are insufficient and untenable. The opinion is not in harmony with the doctrine of *stare decisis*. It is true, as stated in the opinion, that previous decisions on the questions may have been upon checks certified by the bank at the request of the holder, and not at the request of the drawee [payee]. But this makes no difference, so far as the law of the case is concerned, according to the reasoning of these prior adjudicated cases. These decisions, holding such checks to be payment, assign as a reason in justification of such holding that 'the moment the check is certified, the funds cease to be under the control of the drawer, and pass under the control of the drawee [payee] thereof.' Now, does not the reason assigned for the decisions upon such checks heretofore made apply with equal force, whether certified before or after delivery to the drawee [payee]? And does not the acceptor of a check thus certified know, or is he not bound to know, that the law makes such a check payment because, according to judicial reasoning (Judge Elliott's opinion excepted), the moment the check is certified the funds cease to be under the control of the drawer, and pass under the control of the drawee [payee]? It should be the aim of the courts to adopt, so far as it can be done, a general rule to apply to all cases *in pari materia*, instead of torturing the brain to hunt up some fancied distinction, and endeavor to support and sustain such distinction by specious and puerile reasoning. This judicial course may give *éclat* to the writer of the opinion, by making it appear, to superficial observers only, that he has solved and set at rest an open question, but it destroys and mutilates the harmony of legal jurisprudence."³

It being established that in one case a certified check is not a check, but a promissory note of the bank, a certificate of deposit, and that all prior parties thereto are discharged, it must follow that there is the same result in every case of a certified check, unless the law is to revel in distinctions without differences, and in dis-

¹ 94 U. S. 345.

² 123 Ind. 78.

³ 31 Central Law Journal, 93.

inctions which no court has yet been able to state ; and surely no banker would ever think of making a distinction. It is a manifestly harsh and inequitable rule to compel the maker of a check to be liable on it, and yet to hold, as it must be held, in the light of the authorities, that he could not recover from the bank ; for it is universally held that the amount of a certified check has passed beyond the control of the depositor ; and consequently as to that amount the bank owes no duty to the depositor. If, therefore, the maker is held liable in either case, he is compelled to assume the risk of the bank's insolvency, and yet has no power to protect himself from that insolvency in the only way possible, namely, by a withdrawal of his deposit ; and therefore there should be some good and cogent legal reason to support such a conclusion. Such a result most certainly would not be consonant with business usages or understanding, and would be contrary to every principle, both mercantile and equitable.¹

In *Essex County National Bank v. Bank of Montreal*,² Judge Hopkins says,—

“By this act [certification] a new relation was created between the parties. The amount the check called for was withdrawn from the drawer's account and control, and thereafter they had no right of action for it against the bank. The technical operation was a transfer to the holder of the check of the drawer's funds and right of action for it against the bank. . . . It superseded the previous rights and obligations of the parties, and particularly of the drawers. Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification, they had no control over the fund or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check.”³

Moreover, if in one case the effect of certification is a novation, by which the maker is discharged, as it has been shown that it is by the settled law, the same effect must follow in the other case, since the act is the same, and the instrument is identical in every respect. It is impossible for the same act to have two legal consequences, or for negotiable instruments, ostensibly the same, to import different rights.

Francis R. Jones.

¹ *Freund v. Importers and Traders' Bank*, 76 N. Y. 352 ; *Essex County National Bank v. Bank of Montreal*, 7 Biss. 193.

² 7 Biss. 193.

³ 7 Biss. 193, 195, 196.

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THE LAW SCHOOL.—Graduates of the School will be interested to know that Mr. John H. Arnold and his brother, Mr. George A. Arnold, begin this autumn their twenty-first year of service as Librarian and Assistant-Librarian respectively. When they took charge the condition of the library left a great deal to be desired. It is now, as most of our readers know, as perfectly adapted to its purpose, both in completeness of equipment and in convenience of use, as any library in the United States. This is not a small thing to say; for the demands made upon it are heavy in proportion to the importance of the part which is played under the Langdell system of teaching by the consultation of reported cases. To Mr. Arnold's skilful and devoted service—in particular to his unrivalled knowledge of legal bibliography and to his sagacity in the discovery and purchase of books—the School owes a debt which it is hard adequately to state. The Review can only express the hope that he may continue in his present position long enough to double it.

It is worth noting in this connection that during the summer Mr. Arnold arranged abroad for the purchase of almost a complete set of English reports,—the third in the library. The other preparations for the increase in the number of students, outlined in the May number of the REVIEW, have been made as planned. Exactly how great the increase will be, it is not possible yet to state; it will not be less, however, than was estimated last spring.

The new course in the New York Code of Civil Procedure, referred to in May as a possibility, is an accomplished fact; the Faculty, in response to a numerous signed petition, having voted to establish it as an extra course, on the same footing as that on Massachusetts law. James Byrne, Esq., of New York, who graduated from Harvard College in 1877, and from the Law School (with very high rank) in 1882, has accepted the appointment as instructor. The lectures will be given on Saturday mornings, beginning January 1, and altogether will take as much time as a course running one hour a week for the entire year.

The very gratifying announcement has been made that the School will soon possess an oil portrait of Professor Langdell. Last winter the Council of the Law School Association appointed a committee to raise funds for this purpose among both past and present members of the School. The response was exceedingly gratifying; the artist, Mr. Frederick P. Vinton, of Boston, has already finished his work, and it is expected that the formal presentation of the portrait will take place within a few weeks.

THE IMPORTANCE OF "GENERAL USE" IN PATENT DECISIONS.¹—The case of *The Barbed Wire Patent*, to appear in 143 U. S. 275, is one of exceptional value. The decision is not inconsistent with the cases which are near it in point of time, in which the grant of a patent was overruled by reason of want of novelty; but the rule which is laid down by Mr. Justice Brown certainly defeats the artificial conclusions which recent discussion has been supposed to support.

The court goes back to the very beginning of the law. There was an organic provision whereby authors and inventors were to receive a reward,—the exclusive enjoyment for a limited period of their writings and discoveries. This provision was meant to give the author or inventor a privilege in return for what he gave the State. For a considerable period the true purpose of this provision was, as far as it related to the useful arts, perhaps too strongly emphasized. The elasticity of the statutes was overtaxed; with the result that the now settled principles concerning reissued patents were developed, and, as an incident, what may be designated the doctrine of "the expected skill of the calling." The rule affecting reissued patents was a logical evolution from what preceded it; but, with the greatest respect, very little can be said to justify the doctrine of "the expected skill of the calling." According to this, the examples illustrative of the state of the art or existing knowledge having been produced, the court, wholly unskilled in the art, proceeded to say whether the example which was the subject of the patent was within the intellectual grasp of a skilled operator in possession of all the factors of knowledge. That some such criterion must necessarily be applied in many cases is obvious; but the rule is none the less arbitrary, and therefore dangerous.

In the case before us the court does not deal directly with questions relating to the "expected skill of the calling," but leaves that hopeless chapter where it is. The syllogism of its argument is, (1) the organic law has offered a reward to the inventor; (2) the inventor is he who gives the public a new tool or formula (3) whether the tool or formula is new is a question of fact to be determined upon evidence; (4) the most convincing evidence is the acceptance, indorsement, and use of the tool or formula by the public; and (5) the deductions from the act of the public cannot be displaced by testimony which leaves any room for reasonable doubt.

The patent in question was sought to be invalidated on the ground that it was wanting in novelty; and in support of this defence a great mass of evidence was produced. In his opinion, Mr. Justice Brown refers specifically to numerous instances in which devices very closely resembling

¹ We are indebted to Rowland Cox, Esq., of New York for the following note on the case of *The Barbed Wire Patent*,

that of the patentee are shown and described, and after pointing out the technical differences, emphasizes the fact that the sales of the subject of the patent indicated a phenomenal demand for it, while the demand for the old devices had been in each instance too small to be worth consideration.

"Under such circumstances," it is said, "courts have never been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into success. In the law of patents it is the last step that wins. . . . There was evidently, prior to Glidden's application, more or less experimenting in a rude way. . . upon the subject of barb wires as applied to wire fences; and we think that it is quite probable that coiled barbs were affixed to single wires before the Glidden application was made. We are not satisfied, however, that he was not the originator of the combination claimed by him. . . . It is possible that we are mistaken in this. But it was Glidden, beyond question, who first published this device, put it upon record, made use of it for a practical purpose, and gave it to the public, by whom it was eagerly seized upon, and spread until there is scarcely a cattle-raising district of the world in which it is not extensively employed. Under these circumstances, we think the doubts we entertain concerning the actual inventor of this device should be resolved in favor of the patentee."

There can be no doubt about the significance of this generalization. It does not go beyond the requirements of the case; but the case was a marginal one, and for this reason the generalization is valuable. To defeat a meritorious patent there must be (1) "*knowledge*" and (2) "*existing knowledge*." There must be in the past a thought which matches the thought of the patentee, and that thought must have taken root. The circumstance that the same concept may as a problem or conjecture for a limited period have occupied another mind, does not affect the right of the mind that solved the problem. It may even be that the solution itself took form in the mind which at an earlier date had the problem before it. But unless the solution was seen and understood to be a solution, the right of the patentee who published it and gave it place and certainty in the arts is unaffected.

Mr. Justice Brown's opinion may be said to be distinctly ethical in its nature. It construes the contract between the patentee and the public as it ought to be construed in a court of equity, and is in effect an announcement that wherever the public have received the benefit which should be the foundation of a patent, the grant will, if possible, be held good.

"ACCEPTANCE" UNDER THE STATUTE OF FRAUDS; THE LATE ENGLISH DOCTRINE SLIGHTLY SHAKEN. — The case of *Taylor v. Smith*, 67 L. T. Rep. N. S. 39, gives some ground for hope that the doctrine put forth some fifteen years ago as a corollary to *Morton v. Tibbett*, — a doctrine as illogical in its origin as absurd in its result, — is held at its true worth by at least a part of the English judges. *Morton v. Tibbett* decided merely that a resale of goods before receipt was evidence for the jury of such an acceptance as would satisfy the Statute of Frauds, though it would not cut off a right of action for inferiority to sample. Though there was nothing necessarily misleading in Lord Campbell's language in that case, it was seized upon by the English judges as an excuse for satisfying their dislike for this section of the statute, by making this perfectly reasonable

decision serve as a pedestal to the paradoxical doctrine that rejection by itself could be evidence of acceptance. Thus acceptance came to mean some evidence that the defendant acknowledged the existence of some contract, in intended fulfilment of which the goods were shipped. This notion got pretty well on its feet in *Kibble v. Gough*, where the judges, in a case that might have gone on a proper ground, took occasion to state, in the language of Lord Justice Brett, that "there was a sufficient acceptance under the Statute of Frauds, although there was still a power of rejection." This substitution of "rejection" for "objection" took its full expression in *Page v. Morgan*. There, all that was done by the defendant was to have some of the bales of cotton hoisted into his loft for examination, upon which they were promptly rejected. Lord Justices Brett, Bagallay, and Bowen found in this "an acceptance that could not have been made except upon the admission that there was a contract, and that the goods were sent in fulfilment of it. The defendant accepted the goods to see if they agreed with the sample," which is a dealing with the goods involving the admission of a contract.

The Court of Appeal now finds before them a case almost identical in its facts with *Page v. Morgan*. Receipt is fairly clear, and the only real difficulty arises on acceptance. The evidence of this was that the defendant, on receiving an advice note from the carrier that a certain number of deals were at his door for him, examined them, and then wrote across the advice note, "Refused. Not according to representation. J. SMITH," and returned it to the carrier. Eleven days later, after some correspondence between the carrier and the plaintiffs, the defendant wrote the plaintiffs as follows: "With reference to the deals now lying at Kenworthy's, they are not according to representation, and much inferior in quality to St. John's spruce deals I have seen. I consider them ros. per standard below average value, and therefore cannot accept same. J. SMITH."

This was a much more conclusive acknowledgment of the existence of a contract than can be found in *Page v. Morgan*; but Judge Wright, sitting without a jury, found that there was no acceptance, so that though the goods were according to sample, the plaintiff could not recover. The case went up on appeal, the main question being whether the judge below was wrong on the question of acceptance. Of course, in supporting his decision, the court is able to distinguish the actual decision in *Page v. Morgan*, as the question was merely whether there was evidence of acceptance to go to the jury. The language, however, is sufficiently unenthusiastic. Receipt is not enough, Lord Herschell says. "That has been held in several cases of long standing, which have not been overruled by the subsequent cases, although the latter, no doubt, contain some *dicta* which may not be consistent with former cases. . . . What the exact meaning is of the word 'acceptance' in the statute it is not necessary now to determine, nor has it ever been determined."

Though Lord Herschell states that he is only deciding that he cannot say the judge below was wrong, he does give his opinion on the facts: "The mere inspection of these goods by the defendant on the two occasions I have referred to, did not amount to an acceptance, even when accompanied by such delay as there was in communicating with the vendors."

Lord Herschell understands the feeling that has led the judges into this absurdity, and seems to sympathize with their dislike of the famous

section; but he does not feel their way of showing their disapproval to be either honest or advisable. "If I could come to such a conclusion," he says, "I should not be indisposed to arrive at it, because where there is a contract one does not like to allow it to be repudiated." But I think that even greater hardship would be the result by frittering away the effect of the statute by nice distinctions."

Lord Justice Lindley distinguishes *Morton v. Tibbett* without trouble, remarking that about that case he says "nothing, except that I accept it. I think it plain that there is no acceptance at all. It is paradoxical to say that when a man sees a thing and rejects it he accepts it."

Of course this is careful language, but it seems sufficient to warrant a hope that as the unworthy ancestry of the doctrine is now distinctly seen, and its sophistry appreciated, the notion may soon be tested in the House of Lords, and either laid to rest forever, or made unimportant by the repeal of the obnoxious provision.

THE MEANING OF "PENAL" IN INTERNATIONAL LAW.—The case of *Huntington v. Atrill*, 8 Times L. R. 341, decided this spring in the Privy Council, is an important addition to a difficult and somewhat confused branch of International Law. The only case quoted as directly in point is a proceeding in equity between the same parties in Maryland in 1889 (70 Md. 191). A New York statute provides that if any certificate or report made, or public notice given, by the officers of a certain corporation be false in any material representation, "all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof." The damages sought for false representation under this statute in these two cases was over \$100,000. The defence was that as the clause was penal, a rule of international law forbade recovery in a foreign jurisdiction. That the courts of one State will not enforce the penal code of another is not disputed, and the only important controversy is on the meaning of the word "penal." The Maryland court decided, by five judges against two, that there could be no recovery. Their argument was that the clause does not give mere compensation for injury to the individuals injured, but gives compensation to all the subscribers, whether affected or not by the misrepresentation, and that to the full extent of their claim, as soon as it is shown that any offence of the kind forbidden has been committed. "It is extremely difficult to conceive that the statute was not intended to provide a punishment for the obnoxious acts. The payment of a sum of money, which a party would not otherwise be obliged to pay, is no less a punishment because it is inflicted through the medium of a civil suit instead of a criminal prosecution." This last point is supported at some length by the learned judge, though the dissenters accept it freely. They also agree with Judge Bryan that his numerous quotations prove that in construing statutes "penal" is often used as equivalent to punitive, in distinction from compensatory. What they do is to supplement his quotations with others bringing out a meaning equally well defined, which they hold to be the proper one as applied to the rule of international law under discussion. In this sense, says Judge Stone, for the dissent, the word "penal" is used only where the action is not for a private injury, but in the name of the State for the violation of her laws. He finds a satisfactory statement in the case of *Wisconsin v. Pelican Insurance Co.*, 127 U.S.

265, where Judge Gray says: "The rule that the courts of no country execute the penal laws of another, applies not only to prosecutions and sentences for crimes and misdemeanors, but to all writs in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." And he takes this with a negative, *i. e.*, that the rule extends no further. To his mind, "penal" here is synonymous with the proper meaning of "criminal;" that is, covering breaches of duty which confer no rights on individuals, and of which the State alone has cognizance.

The Privy Council unanimously accept the reasoning of the dissenting Maryland judges, though the Court of Appeal, from which the case was appealed, had been equally divided. They go over with care the few cases in which the language seems against their decision, and point out clearly that the Maryland decision—the only one directly in point—is based on a failure to distinguish the two meanings of the word "penal." Lord Watson, who delivered the opinion, states that their lordships had already intimated that the term was inadequate, having a perfectly proper sense in which it fails to mark entirely that distinction between civil rights and criminal wrongs which is the very essence of the international rule. Though there is a little direct authority on the point, it would seem that the English decision must be everywhere accepted; and thus one more of the ghosts born of carelessness in the use of the words be laid at rest.

RECENT CASES.

AGENCY — VICE-PRINCIPAL — MASTER AND SERVANT. — In Indiana, a baggage-master on a railroad train is considered a fellow-servant with the conductor of another train, through whose negligence a collision occurs. *Kerlin v. Chicago, P. & St. L. R. Co. et al.*, 50 Fed. Rep. 185 (Ind.).

A brakeman on one train is a co-servant of the conductor and engineer of another train, and if killed in a collision caused entirely by the negligence of the latter, the company is not liable. *Baltimore & O. R. Co. v. Andrews*, 50 Fed. Rep. 728 (Ohio).

Railroad Co. v. Koss, 112 U. S. 377, is distinguished in both of the above cases; in the former one, Judge Baker, in speaking of the *Ross* case, says, "It reaches the borderline, and ought not to be held to be controlling, except in cases presenting the same facts."

ASSUMPSIT — IMPLIED PROMISE TO PAY FOR USE OF PROPERTY. — Where the owner of premises has put in a telephone under a contract with the company to pay a stated sum each month for a period not expired, the occupant of the premises who uses the telephone is liable upon an implied promise to repay the owner. *McSorley v. Faulkner*, 18 N. Y. Supp. 460 (Common Pleas of N. Y. City and County).

This holds that a promise will be implied to pay for the use of another's property, although such use causes no loss to the owner. It seems contrary to *Phillips v. Homfray*, 24 Ch. Div. 439, 461-463, in which case it was held that where one had carried coals from his mines through passages under the plaintiff's farm, no action in the nature of contract would lie against him or his executor.

ATTACHMENT — RIGHTS OF JOINT DEBTOR. — Plaintiff was jointly indebted to a third person under a mortgage and lien on certain property to secure payment of a joint debt. He sold out his interest to his co-debtor, under an agreement that the co-debtor should pay all outstanding obligations. Plaintiff then paid the debt secured by the mortgage, taking an assignment thereof, and attached the property covered by the mortgage. *Held*, that he acquired no rights thereby which he could enforce in an action to try title against a claimant of the property. *Allison v. Patterson*, 11 So. Rep. (194 Ala.).

BAILMENT — ACTION BY BAILEE. — A is in possession of B's horse to sell the same, with permission to use until the sale is made. By the negligence of the defendant company the horse is frightened and injured while being driven by A's servant. *Held*, that A., the bailee, being under no liability to the bailor for the injury to the horse, could not recover. *Claridge v. So. Staffordshire Tramway Co.* [1892], 1 Q. B. 422 (Eng.).

This case is opposed to what is the established American and what has been understood hitherto to be the established English doctrine. Sedgwick on Damages, 8th ed. §§ 76-78, and cases there cited; Holmes on the Common Law, pp. 173-175; *Sutton v. Buck*, 2 Taunt. 302 (1810); *Burton v. Hughes*, 2 Bing. 173 (1824).

The disputed point has been whether the bailor might also have an action in any form, *Tolan v. Cross*, 2 Camp. 464 (1810); *Nichols v. Bastard*, 2 C. M. & R. 659 (1835); *Mardus v. Williams*, 4 Exch. 339 (1849); but the right of action in the bailor has not been held to limit in any way the right of the bailee to sue, and (the bailor not having already sued), to recover full damages. *Sutton v. Buck*; *Burton v. Hughes*; *Nichols v. Bastard* at p. 660 (*semble*); *Mardus v. Williams* at p. 344 (*semble*) *supra*.

BILLS AND NOTES — FORGERY — DRAWER'S RIGHTS. — Defendant bank discounted a forged draft, and indorsed it to A for collection. A presented it to plaintiff bank, the drawee, which paid it, and defendant received the money. *Held*, that the plaintiff could recover the money paid as the defendant, by its indorsement, gave the paper an appearance of genuineness which would put the plaintiff off its guard in paying. *First Nat. Bank of C. v. Ind. Nat. Bank*, 30 N. E. Rep. 808 (Ind.).

This decision of the Appellate Court of Indiana is in direct opposition to well established authority; cf. Ames, *The Doctrine of Price v. Neal*, 4 Harvard Law Rev. 297.

CONSPIRACY — CONTRACT IN RESTRAINT OF TRADE. — *Held*, in affirmance of the opinion of Lord Coleridge in 21 Q. B. D. 544, and of the majority opinion of the Court of Appeal in 23 Q. B. D. 598 (Lord Esher dissenting), that a combination of steamship companies, formed for the purpose of getting a monopoly of the China tea trade, was not illegal as in restraint of trade. *Held also*, that there was no liability to the plaintiffs for malicious conspiracy, although the means employed by the defendants in carrying out their purposes were (1) the exclusion of the plaintiffs from the combination; (2) an offer of a rebate to shippers on condition that they would not deal with the plaintiffs, but exclusively with defendants; (3) the sending of special ships to the plaintiffs' port of shipment in order by competition to deprive the plaintiffs' vessels of profitable freight; (4) the offer at the plaintiffs' port of shipment of freights at a rate which would not repay a shipowner for his adventure, in order to sweat freights and frighten the plaintiffs from the field; (5) warnings to shipping agents that if they shipped by plaintiffs' vessels, they, the defendants, would have no dealings with them. *Mogul S. S. Co. v. McGregor, Gow, & Co.* [1892], A. C. (Eng.).

On point of restraint of trade, compare *Morris Run Coal Co. v. Barley Coal Co.*, 658 Penn. 173, and *People v. North River Sugar Refining Co.*, 61 N. Y. Sup. Ct. 354, showing a contrary American tendency.

On the second point this case shows the line beyond which the English Courts will not go in actions for malicious injury. No injury will be deemed malicious which is caused in the course of trade by competition, however fierce, although the plaintiff's competitors are acting in combination. See Bowen, J., pp. 613-14, in 23 Q. B. D. Cf. dissenting opinion of Lord Esher at p. 609 in 27 Q. B. D. Cf. also *Walker v. Cronin*, 107 Mass. 555; *Daly v. Winfree*, 16 S. W. Rep. 111.

CONSTITUTIONAL LAW — ANTI-TRUCK LAW. — An Act made it unlawful for any person, etc., engaged in manufacturing or mining business in the State to be interested directly or indirectly in keeping a truck store or any store for furnishing supplies, tools, etc., to the employees while engaged in manufacturing or mining. A penalty was imposed for a breach of this law; but no similar restrictions were imposed on employers engaged in other kinds of business. *Held*, that the Act was unconstitutional, as it deprived persons of property rights without due process of law. *Frorer v. People*, 31 N. E. Rep. 395 (Ill.).

The Supreme Court of Illinois here adds its weight to the decisions in Pennsylvania, West Virginia, and Massachusetts declaring unconstitutional legislative restrictions on the contracts or other business relations of particular classes of employers and employees. Cf. *Godcharles v. Wyeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va., 179; *State v. Fire Creek etc., Coal Co.*, 33 W. Va. 188; *Cow v. Perry*, 28 N. E. Rep. 1126 (Mass.). See also *Millet v. People*, 117 Ill. 294, and *People v. Gilson*, 117 N. Y. 389.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CARRIERS OF PASSENGERS OF DIFFERENT RACES. — A State statute requiring officers of railroad companies to assign passengers to coaches or compartments set aside for the use of the race to which

they belong, is a regulation of commerce, which though valid as applied to domestic passengers is unconstitutional as applied to interstate passengers, being in violation of the exclusive right vested in Congress to regulate commerce between the States. *State v. Hicks*, 44 La. Ann., 11 So. Rep. 74.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — St. 1891, c. 58, forbids the manufacture or sale or offering for sale of any article in imitation of yellow butter, and provides that the Act shall not be construed as forbidding the manufacture or sale of oleomargarine in a distinct form such as will advise the consumer of its real character. *Held*, that this Act prohibits only deception in the sale of oleomargarine for butter, not commerce in it, and although it prevents sales of colored oleomargarine even when brought in original packages from other States, it is a valid police regulation, and not an unconstitutional interference with interstate commerce. *Com. v. Huntley*, 30 N. E. Rep. 1127 (Mass.). The court cites and agrees fully with the doctrine of *Leisy v. Hardin*, 135 U. S. 100.

CONSTITUTIONAL LAW — POWER TO PUNISH FOR CONTEMPT. — An Act creating a board of tax commissioners, with power to summon and examine witnesses, gave such board power to fine and imprison for contempt. *Held*, that this power violated Const. art. 3, § 1, since the board is a part of the State executive department, and the courts alone have power to punish for contempt. *Langenberg, Sheriff, v. Decker*, 31 N. E. Rep. 190 (Ind.).

CONTRACT — OFFER OF REWARD. — The proprietors of a patent medicine offered a reward of £100 to anyone who should contract influenza after using the medicine according to directions. *Held*, that there was a valid contract between the company and a person who fulfilled all the conditions, with knowledge of the offer. *Carhill v. The Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

The point is quite a novel one, and the decision seems sound.

CORPORATIONS — PREFERENCE. — *Held*, that an insolvent corporation cannot prefer the debts of a member of its governing board. *Corey et al. v. Wadsworth*, 11 So. Rep. 350 (Ala.). *Corrugating Co. v. Thatcher*, 6 So. Rep. 366, 87 Ala. 458, overruled.

DOWER — WIDOW'S RIGHTS IN UNOPENED MINES. — A grant of dower in lands of her deceased husband, valuable solely as mineral lands, includes their use, and entitles the widow to the proceeds of mining leases thereof, though the mines were not opened before her husband's death. *Seager v. McCabe*, 52 N. W. Rep. 299 (Mich.).

This is a well-considered departure from the common law and from the text-books (Washb. Real Prop. 166), but it carries out the tendency of American courts, spoken of in *Gaines v. Mining Co.*, 33 N. J. Eq. 603; though the precise point as to unopened mines has not arisen here before.

ELECTIONS — PRINTED BALLOTS — WRITTEN ALTERATIONS. — A Louisiana statute directs "that all the names of persons voted for shall be printed on one ticket, or ballot, of white paper, of uniform size and quality, to be furnished by the secretary of state." *Held*, that the name of a candidate written on the face of an election ticket in place of the name of another candidate printed on the ticket should not be counted in ascertaining the result of the election. *State ex rel. Mize v. McElroy, Returning Officer*, 11 So. Rep. 133 (La.).

The court say that constitutional and statutory provisions for the conduct of elections are either mandatory or directory; and a violation of mandatory provisions will avoid the elections, without regard to the nature of the person guilty of the violation, and without reference to the result. 6 Amer. and Eng. Enc. Law, p. 325.

EQUITY — COVENANT BY LESSOR — SPECIFIC PERFORMANCE — INJUNCTION. — The defendant lessors covenanted with the plaintiff lessee of a flat to provide a porter resident in the building, to be constantly in attendance within, in person or by some trustworthy assistant. The lessors appointed a cook to reside on the premises, and permitted him to carry on his business as cook at another place, and delegate his duties as porter to boys and charwomen. Plaintiff prays for (1) an injunction to restrain defendant from employing as porter any person who was not resident and constantly in attendance, and able and willing to act as the servant of the plaintiff according to the agreement; (2) specific performance of the agreement to appoint a resident porter in charge of the block; (3) damages.

A. L. Smith, J.: "I will grant an injunction, or decree specific performance of the covenant, if that is the more appropriate course." *Ryan v. M. T. W. Chambers Ass'n*, [1892] 1 Ch. 472 (Eng.).

Quere whether the covenant in this case was a fit subject for specific performance. Although the court might decree that the lessor should appoint a competent porter, the

right to remove the porter at pleasure was expressly reserved to the lessor by the contract, and the court could hardly undertake to inquire into the merits and demerits of each successive porter. If by affirmative decree specific performance could not be given, the court should not have granted an injunction. There was no negative covenant, and an injunction against the breach of an affirmative covenant, which the court acknowledges it cannot enforce specifically, presents the same difficulties as specific enforcement, being a mere subterfuge to wipe out the necessary and well-recognized distinction between covenants which are in their nature enforceable and those which are not. See *Johnson v. Shrewsbury & Birmingham R'y Co.*, 3 De Gex, M. & G. 913, at pp. 930-932; *Whitford Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

EXTRADITION—INTERSTATE.—A person brought from one State into another upon a criminal charge named in the extradition proceedings becomes subject to the jurisdiction of the courts of the State to which he is brought, and he may be discharged and rearrested upon a different charge. *People v. Cross*, 19 N. Y. Supp. 271 (Sup. Ct.).

The authorities are in conflict, as the court shows. A different rule prevails in cases of international extradition. *U. S. v. Rauscher*, 119 U. S. 407.

HUSBAND AND WIFE—ADVERSE POSSESSION OF LAND BY WIFE.—Defendant, under a void decree of divorce and a partition of property incident thereto, occupied for the period of limitation a certain lot of land formerly belonging to her husband, claiming it as her own. *Held*, in an action by the grantee of defendant's husband, that defendant could set up, as against her husband and those claiming under him, the defence of adverse possession. *Warr v. Houeck*, 29 Pac. Rep. 1117 (Utah).

The Utah Married Woman's Statute is in the common form, merely providing that "either spouse may sue or be sued," etc. This decision, implying that the husband had had a right either of action or of entry against the wife, is contrary to the weight of authority; such statutes being in general strictly construed as regards the rights of husband and wife against each other.

INJUNCTION—ERECTING STATUE—RIGHT TO PRIVACY.—A person may enjoin the making and placing on exhibition of a statue of a dead relative, unless such relative was a public character. *Schuyler v. Curtis*, 19 N. Y. Supp. 264 (Sup. Ct.).

This affirms the decision commented upon in 5 Harv. Law Rev. 148.

INTERSTATE COMMERCE ACT—DISCRIMINATION.—The issuance of "party rate" tickets, each good for a party of ten or more persons, at the rate of two cents per mile, while single passengers are charged three cents, is neither an unjust discrimination nor an undue or unreasonable preference or advantage within the meaning of the Interstate Commerce Act, when such tickets are offered to the public generally. Brown, J., says: "It was not intended [in passing the Act] to ignore the principle that one can sell at wholesale cheaper than at retail." *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 12 Sup. Ct. Rep. 845.

REAL PROPERTY—RIPARIAN RIGHTS.—A fresh water stream at low tide ran through a tidal channel from which the tide wholly ebbcd. *Held*, that the boundary of this stream was not "low water mark" in the meaning of the colony ordinances of 1641, 1647; and such channel was not the boundary to the land of the adjoining proprietors. Field, C. J., Knowlton and Lathrop, J. J., dissent. *Tappan v. Boston Water Power Co.*, 31 N. E. Rep. 703 (Mass.).

REAL PROPERTY—EASEMENTS—LATERAL SUPPORT.—Defendant, preparing to lay a foundation, dug a trench on his own land, adjoining plaintiff's land, thereby causing plaintiff's building to fall. In suit for damages, plaintiff alleged a want of proper care on defendant's part, in that he did not dig the trench in sections, though that would have added to the expense. *Held*, that plaintiff could recover if the fall of the building was caused by a want of ordinary care on defendant's part.

Sherwood, C. J., dissented, on the ground that the right to lateral support is a right to support of the land only; it being shown here that the land would not have fallen had no building been on it, there should be no recovery. *Larson v. Metrop. St. Ay. Co.*, 19 S. W. Rep. 416 (Mo.).

It is submitted that the dissenting judge is right. The general American rule is to allow damages only for the injury to the land, and that only when the land in its natural state would have fallen. See 2 Washburn Real Prop. (5 ed.) pp. 380-382.

STATUTE OF FRAUD—TRANSFER OF PRE-EMPTION CLAIM.—Defendant, having applied for the pre-emption of certain land, orally sold the pre-emption to L, who sold to plaintiff, part of the purchase-money only being paid down, remainder to be paid when the deed was made out. Plaintiff now offers to complete the payments, and demands a conveyance; he has occupied and improved the land. *Held*, in answer to

the defence of the "Statute of Frauds," that a deed in writing is not essential to the transfer of a pre-emption claim. A verbal sale to one who immediately occupies, is sufficient. *Hickman v. Withers*, 19 S. W. Rep. 138 (Texas).

The court follows 10 Tex. 455, but, it is submitted, should have decided *contra*. The pre-emption claim is an interest in land, and, as such, within the terms of the statute.

STATUTE OF LIMITATIONS—CONSTRUCTION.—Under a Minnesota Statute (Gen. St. 1878, c. 66, § 16) providing that "when a cause of action has arisen in a State or Territory out of this State, and by the laws thereof an action thereon cannot there be maintained by reason of the lapse of time, an action thereon cannot be maintained in this State," — *held*, that though the cause of action arose in Wisconsin, yet since it subsequently came under the law of Iowa and continued long enough to be a bar under the Iowa statute, it is a bar in Minnesota; although in Wisconsin, where the cause of action first arose, the operation of the statute would have been suspended by reason of defendant's absence from the jurisdiction. *Luce v. Clarke*, 51 N. W. Rep. 1162 (Minn.)

Osgood v. Artt, 10 Fed. Rep. 365 (Ill.), — the only other case on the point, — *accord*.

TAX SALE—REDEMPTION—EXTENDING TIME—CONTRACT OF PURCHASER.—The right of a purchaser other than a State, or some governmental agency acting as such, at a sale of lands for taxes under a statute which provides that the purchaser or his assignee shall have a conveyance of the land unless the land shall be redeemed within one year next succeeding the sale, is a contract right; and a statute passed subsequent to such sale, which proposes to extend the period allowed by the former Act for redeeming the land from the sale, is a violation of the contract, and hence of no effect as to such purchaser or his assignee. *Hull v. State ex rel. Rollins*, 11 So. Rep. 97 (Fla.).

The court approve Cooley's criticism on *Gault's Appeal*, 33 Pa. St. 94, where it was held that the time for redemption might be extended from one to two years, the reasoning being based on the liberal construction to be put upon redemption laws. See Cooley's Constitutional Limitations, p. 291, and Cooley on Taxation (2d ed.), pp. 544, 545.

TORTS—NEGLIGENCE.—A, a manufacturer of goods not ordinarily of a dangerous nature, put on the market for use a step-ladder. At time of sale, neither he nor the vendee knew or could know it was in fact negligently made. *Held*, that B, a servant of a subsequent vendee, having no contract relation with A, could recover for injury from using it. *Schubert v. J. R. Clarke Co.*, 51 N. W. Rep. 1103 (Minn.).

This applies to the full the principle laid down by Brett, M. R., announced in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503.

TRUSTS—FOLLOWING PROCEEDS OF PARTNERSHIP MONEY.—A partner insured his life for his wife's benefit, and paid the premiums with money improperly taken from partnership funds. *Held*, the wife's insurable interest in her husband's life is her own property, so that the proceeds of the policy are not solely the result of partnership money, and cannot be impressed with a trust, but only with a lien for the amount of the premiums and interest. *Holmes v. Gilman*, 19 N. Y. Supp. 151 (Sup. Ct.).

REVIEWS.

SELECT CASES ON EVIDENCE AT THE COMMON LAW. WITH NOTES. By James Bradley Thayer. Cambridge: Charles W. Sever, 1892. pp. 1229.

The aim of the author has been chiefly to prepare a book for the use of students. We have no hesitation in giving the work our hearty approval. The first chapter contains a short sketch of the jury, its duties, and mode of proceeding in early times. It contains also the leading cases on topics which, although strictly not a part of the law of evidence, are usually so treated; for example, the burden of proof, presumptions, and the respective provinces of the court and the jury. The next three chapters are devoted to the rules on which evidence is excluded. The fifth and last chapter takes up the subject of witnesses, their competency, privilege, and finally the method of examination. As all the leading cases on the various subjects are systematically arranged, the book will be

of great use to practising lawyers as well as to students. The absence of head-notes to the cases may be a drawback in the eyes of the former; but such an omission is necessary to insure a careful study of the cases in class, and it is for use in class that the book was written. It is most admirably adapted to this special purpose. For the greater part, Professor Gray's "Cases on Property" have been taken as the model in type, binding, and general appearance; but by having special paper made, Professor Thayer has been enabled to compress into a single serviceable volume far more pages. From the Law School point of view, he is entitled to more gratitude than men in future classes will be likely to realize; and this will probably not be confined to Cambridge, for the book is already announced as required for the course in Evidence at Columbia.

J. M. N.

THE LAW OF CONTRACTS IN RESTRAINT OF TRADE. By George Stuart Patterson, Fellow in the Department of Law of the University of Pennsylvania. Philadelphia: University of Pennsylvania Press, 1891. pp. 70.

This useful little monograph is uniform in make up with "The Federal Power over Commerce," by Mr. W. D. Lewis, issued from the same Press, which the Review had occasion last spring to praise very highly. Like his associate, Mr. Patterson has done a scholarly piece of work, and has rendered the profession a service by bringing together, mainly in chronological order, all the reported cases on this extremely important and growing subject. If one were to criticise him, one would suggest that a little more pains might have been well spent upon his English, and that upon a topic so unsettled he could profitably have gone further in the direction of systematic criticism. He has given us a good, but not in the least a brilliant, piece of work.

P. S. A.

BALLARDS' ANNUAL ON THE LAW OF REAL PROPERTY, vol. i., 1892. By T. E. and Emerson E. Ballard. One volume. pp. 827. Crawfordsville, Ind.: Ballard & Ballard, 1892.

"The Annual" is not of the fish nor flesh nor fowl of legal literature. Something more than a digest, something less than a treatise, somewhat composed of reprints of cases, its purpose is each year to note and comment on the changes in the law of real property made by the three thousand cases (p. 7) annually decided on this subject by the courts of last resort, State and Federal.

The reports fill four fifths of the volume. The annotations, neither very full nor scholarly, will scarcely enhance the value of the work. The book is well indexed, and the compilation careful.

"The Annual" seems the natural child of the American Reports and the American Digest. It is another attempt to furnish easy handles to the mass of current reports, and as such is interesting to all interested in law. We hardly share the belief of the authors that their method of arrangement has solved this problem. The usefulness of the work will be, not to the student, but to the maker of briefs.

J. C.

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NO. 4.

A NEW VIEW OF THE DARTMOUTH COLLEGE CASE.¹

[The following notes by Chief-Justice Doe were made some time since in the investigation of a case then pending before the Supreme Court of New Hampshire. He may use them in preparing the opinion to be hereafter reported in that case. — EDITORS.]

IN the frequent comments which have been made upon the Dartmouth College Case, it has been quite common to discuss the matter: first, as if the sole question was whether a charter is revocable; and second, as though the interests of corporators, if not protected by the Federal Constitution, were not protected at all. But if the counsel for the College were correct in their contention, the Acts of 1816 were much more objectionable than an Act simply repealing the charter. Those Acts, in their view, not only abolished the old corporation, but also gave its property to a new one.² The question involved, not merely the power to revoke the charter of a corporation, but the much more dangerous power to confiscate its property. The counsel for the College, having an eye to the immediate interests of their clients, and probably fearing that the Legislature might pass a simple repeal-

¹ A brief history of the litigation is appended for reference. See page 181.

² "In the Dartmouth College Case the Legislature of New Hampshire, by a special Act, undertook to abolish, in effect, a private corporation, and to give its property to others." Mr. Webster, in argument, *Foster et al. v. Essex Bank*, 16 Mass., at p. 269.

ing Act, appear to have argued the case upon the assumption that the two powers must stand or fall together. They deny the existence of either power; but they do not seem to deny that if the Legislature could revoke the charter, they could also dispose of the corporate property at their pleasure. It is now the settled doctrine, in the federal and other jurisdictions, that corporate dissolution does not take corporate property from its equitable owners. Under this modification of the ancient rule, the extinction of the College corporation by a repeal of its charter would not be as important as it was understood to be in 1819. The conclusion reached in the following notes is that a corporate charter is not a contract within the meaning of the Federal Constitution, and is revocable; that a repeal of the College charter would not divert the College property from the uses for which it is held in trust (the law not allowing the trust to fail for want of a trustee); that both courts were wrong; that the State Court erred in holding that the Acts of 1816 were not in violation of the State Constitution; and that the Federal Court erred in holding that the Federal Constitution prohibited a repeal of the charter.

The members of public corporations "have no private beneficial interest either in their franchises or their property. . . . A gift to a corporation created for public purposes is in reality a gift to the public." The trustees have no "private interest in the property of this institution, — nothing that can be sold or transferred; that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively public, and no private loss to them. . . . Nor is it any private concern of theirs whether their powers, as corporators, shall be extended or lessened. . . . If such a corporation is not to be considered as a public corporation, it would be difficult to find one that should be so considered. . . . These trustees are the servants of the public, and the servant is not to resist the will of his master in a matter that concerns that master alone. . . . If the private rights of founders or donors have been infringed by these Acts, it is their business to vindicate their own rights; it is no concern of these plaintiffs. When founders and donors complain, it will be our duty to hear and decide; but we cannot adjudicate upon their rights till they come judicially before us. . . . The officers and students of the College . . . are not parties to this record, and cannot be legally heard in the discussion of this

cause. . . . The real question then is, Do these Acts unconstitutionally infringe any private rights of these trustees? . . . The legal identity of a corporation does not depend upon its being composed of the same natural persons, and . . . an addition of new members . . . cannot . . . make it a new and different corporation. . . . Nor, by the addition of new members, is any part of the legal title to the corporate property transferred from the old to the new members. The title remains unaltered in the corporation, . . . and the beneficial interest in the public."¹ So say the Supreme Court of New Hampshire, speaking through Chief-Justice Richardson, in their decision of the case.

The preservation of the rights comprised in the equitable title is the purpose for which the donors conveyed the legal title and perpetual powers to the trustees. While the conveyance vested nothing in the trustees for their private benefit, it imposed obligations which they cannot lawfully neglect. With the legal title, they accepted the powers and duties attached to it by the original owners. Their office is the position the donors would occupy if living, and holding the property under a valid and irrevocable declaration of the same trust. By accepting that position the trustees became, for many practical purposes and in a large legal sense, the representatives of the donors and the beneficiaries. One reason for making the trust perpetual was that the time would come when the donors could not administer their own charity, or go into court to defend the legal title, or complain in behalf of the numerous and unorganized body of equitable owners whose interests might need protection. If the trustees held the equitable title, they could waive rights which they are now bound to maintain by a diligent use of their power (not omitting any necessary resort to legal process), as a guardian is bound to care for the rights of his ward. Their lack of private, beneficial interest, and the separation of the equitable from the legal title, do not weaken their legal title, nor affect their power and duty of holding and maintaining their right to hold the property for the benefit of the equitable owners whose protectors they are.

An executor's lack of beneficial interest would not prevent his contesting the validity of a statute appointing two additional trustees to act with him, and conveying to them two-thirds of his title and power. Notwithstanding his lack of personal interest, he could act for those whom he represented, and could

¹ Trustees of Dartmouth College *v.* Woodward, 1 N. H. 111, 117, 119, 120, 121, 122, 123, 124, 125.

assert their right against the statute that would be, not a valid enactment, but invalid administration. A termination of his office by a repeal of law would not make the appointment of his successor a law-making Act. If a repeal of the College charter would create an official fiduciary vacancy, and leave no one in possession of the legal title of the College property, it would not destroy either the legal or the equitable title, and would not give a legislative character to the act of filling the vacancy, or the act of conveying the property. The right of conveyance, like the rest of the rights which constitute ownership, does not belong to the State, and cannot be exercised by the State as owner, nor by those legislative agents of the State who can convey the State's property, but cannot exercise all rights of ownership over all property of which the State is not the owner.

The rule placing "natural persons and corporations precisely upon the same ground" of general liability to legislative control, is "the only one upon which equal rights and just liabilities and duties can be fairly based."¹ A railroad corporation is "put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less."² This is an application of the equitable principle that the corporate fiction does not operate beyond the purpose of its introduction. It neither increases nor diminishes legislative control of natural persons, their legal titles or equitable interests. The theory that an amendment of the Dartmouth charter, enlarging a minority of the corporation into a majority by an appointment of nine additional members, does not convey any part of the property or fiduciary power, and does not affect the legal title of the trustees or the beneficial interest of the students, because twenty-one trustees are the same imaginary being as the twelve, is an application of the error that subjects corporate property to double taxation. The error is an illimitable expansion of the corporate fiction, subjecting natural persons to an impairment of their contracts and an invasion of their legal titles and beneficial interests.

All the legal advantages of individuality desired for a collective and changing body of twelve trustees could have been bestowed upon them by the Provincial Legislature, as well without as with

¹ *Thorpe v. R. & B. Railway*, 27 Vt. 140, 145.

² *Stone v. F. L. & T. Co.*, 116 U. S. 307, 329.

resort to the imagination for the creation of a non-natural person. Incorporation was not necessary for their succession, their exemption from personal liability for the payment of judgments, or their unity in litigation and the service of process. As natural persons, under special or general statute, they could have had succession, exemption, and every benefit of corporate personality. The employment of fiction for this purpose neither subjected them to, nor exempted them from, the exercise of legislative power. So far as the question of power is concerned, it is immaterial whether the object of incorporation was accomplished by incorporation or otherwise. The irrelevancy of the fiction was distinctly asserted by the two members of this court who decided the case (the docket shows that Judge Woodbury, who was one of the nine new trustees, did not sit), when they declared it to be their duty, in determining the rights in controversy, to "look beyond that intangible creature of the law, the corporation, which in form possesses them, to the individuals, and to the public, to whom in reality they belong, and who alone can be injured by a violation of them."¹ The only rights in controversy were the ownership and control of the College property.

Vague and exaggerated ideas were (and still are) entertained of the utility and necessity of incorporation under a general or special law, and of the damage resulting from a repeal of that law. Chief-Justice Marshall said:² "In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating Act. . . . An artificial, immortal being was created by the Crown." An intangible, invisible being, possessing no mental, moral, or physical capacity,³ may be a convenient figure of speech; but the true view of legal principles is to be found in the region of realities, where the college corporation is no other person or creature than the consecutive body of twelve men, who were not created by the Crown, and who could hold and manage the College property without a charter, in the exercise of the common-law powers of trustees

¹ 1 N. H. 120.

² Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518, 637, 642.

³ Case of Sutton's Hospital, 10 Rep. 32 *b*; Tipling *v.* Pexall, 2 Bulstr. 233; Bissell *v.* M. Co., 22 N. Y. 258, 266.

appointed by deeds or wills. The charter was an amendment of the common law,—an act of special legislation, restricted in its operation to a single trust. The statute of limited partnerships¹ is a general act of legislation. It alters the common law in relation to special partners. Being mere legislation, it is repealable, as it would be if it were a special Act applicable to one firm only. In what respect, of any importance in the College case, does the Dartmouth charter differ from the statutory regulation of the rights and liabilities of a special partner?

The founders of Dartmouth College desired to put some of their private property in the hands of twelve agents, called trustees, who should be bound to perpetuate the succession and identity of their agency by exercising their elective power of filling vacancies, and bound to apply the trust-fund according to the donors' lawful directions. It is useful to consider what material part of the plan could not have been as well accomplished by wills or trust-deeds containing the essential provisions of the charter, without an incorporation of the agents; what alteration was made by the sounding phrases of the royal grant; for what purpose was a corporate fiction necessary; what was gained by its acceptance; and what harm would be done by a valid repeal of the charter, terminating the existence of the mythical being created by the Crown. What difference is there in the effect of the charter or the effect of its repeal, whether the power of perpetuating the fiduciary body by appointment is in that body, as in the case of the College and the case of an ordinary academy,² or in other ecclesiastical and political bodies, as in the case of Elliot Hospital,³ or in a judicial tribunal, as in a multitude of other cases?⁴ These are vital questions. They require an analysis of the charter, and an understanding of the distinction between its repealable law and its irrepealable contract. They lead the inquirer away from the fanciful and false theory of an implied governmental promise that the Legislature shall not exercise their power of repealing the charter law, to the express charter stipulations of donors intrusting the legal title, possession, and management of property to twelve trustees, and the agreement of the successive donees (lawfully appointed and accepting the trust fund and its accompanying agency), remain-

¹ General Laws of N. H., c. 118.

² *Sanderson v. White*, 18 Pick. 328, 329, 336.

³ *Chandler v. Batchelder*, 61 N. H. 370, 371; *Laws*, 1881, c. 178.

⁴ *Story*, Equity, §§ 1060, 1287; *Adams*, Equity, 36, 61; *Schouler*, petitioner, 134 Mass. 426; *School-District v. Concord*, 64 N. H. 235.

ing to be performed as long as a remnant of the property can be found.

A valid repeal of the charter would show how much of it is law, made in 1769 by the king, and how much of it is evidence of contracts made at different times by the donors and donees of the property. The charter conveyed no property from the king, and its rescission would annul no conveyance or gift of property and destroy no title. After a legislative revocation, judicial forfeiture, or voluntary surrender of the corporate powers and existence of The Orphans' Home,¹ The Franklin Street Society,² and The Amoskeag Manufacturing Company, their work, continued by unincorporated trustees or partners on the same premises, would be as lawful as if no corporate franchise had ever been granted. The educational substance of the College is no more destructible or pervertible than it would be if no corporate franchise had been accepted by the trustees.

If the charter had conveyed to the trustees an acre of the king's land, the property thus conveyed would have ceased to be the king's, and would not have passed from him to the State; and the State's conveyance of it, without payment of its value, and without legal process, like a conveyance of any other property not owned by the State, would not be an enactment of law. As holders of the legal title and representatives of the equitable proprietors, the trustees could sell the land, because a sale would be an exercise of the owner's right, and would not be legislation. For the same reason, with or without a repeal of the charter, the State could not give the land to others, or exercise the owners' right of sale. The trust fund passed to the trustees from the donors, both parties assenting to the charter as evidence of a contract executed on the part of the donors by their conveyance of title and powers, but executory on the part of the donees during the existence of the fund. The evidence and obligation of this contract would remain unimpaired after the repeal of all the law made by the grant of the charter, and after the extinction of the imaginary being fabricated by the trustees' acceptance of that grant.

If the College trust had been established in 1769 by the private contract of a deed without a charter, and the property had been left, by death or resignation, in 1869, without a manager, the trust would have been sustained by an appointment of trustees. The

¹ Laws of N. H., 1871, C. 98.

² 60 N. H. 342.

law would have made the appointment on grounds of a strictly judicial nature; for a strictly legal cause, stated in writing with legal certainty, made a public record, and maintainable on demurrer; for the sole purpose of accomplishing the donors' design, proved by competent evidence; and after all interested parties had an opportunity for a fair trial, to which they would not be entitled in law-making procedure. The law would have done this through the agency and by the decree of a tribunal liable (as the Legislature is not) to impeachment for partiality, corruption, or any intended wrong in the discharge of the duty of carrying into effect the legally proved intention of the donors. If every vacancy in the unincorporated board of trustees had been filled by the surviving members, for a hundred years, in execution of the contract of 1769, and the board had unanimously accepted a charter in 1869, their mere incorporation would not have changed the school or the fund. Their contract, made by the grantor's delivery and the grantees' acceptance of the deed and property, would have remained to be perpetually performed by the grantees. Their change from an unincorporated to an incorporated body would not have affected the continuous fiduciary powers conveyed with the property by its grantors to its grantees, or the grantees' continuous duty of holding and applying the property in performance of an obligation as contractual as that of a devisee who accepts land charged, by his testator's order, with the payment of a legacy.¹ A return from the corporate to the unincorporate form would leave the substance of the trust unchanged. After a repeal of the supposed charter of 1869, as well as before its enactment, the use of the names of twelve trustees in conveyances, writs, and judgments would not be, for them, a serious disadvantage; and some other law than an Act of Incorporation (which they could refuse to accept) could obviate any public or private inconvenience in the service of process upon them, and relieve them from any personal liability² from which they would be exempt under an unconditional charter. By our common law their perpetual succession could be provided for in the original deed, and subsequent gifts to "The Trustees of Dartmouth College" would be equally valid whether the donees were incorporated or not.

When a due examination of the subject has shown how much the effect of incorporation and the effect of repeal have been overrated,

¹ *Pickering v. Pickering*, 15 N. H. 281, 290, 297; 43 N. Y. 443.

² *Wait v. Holt*, 58 N. H. 467; *Hardy v. Bank*, 61 N. H. 34, 39.

and how much obscurity and mystification have arisen from the theory and practice of administering law to a soulless and bodiless figment incapable of rights or duties, a clear view can be had of the College corporation as a body of twelve natural persons, holding the College property in trust, and having a contractual right and a contractual duty, in court and out of court, to defend both the legal and the equitable title.

The Act of 1816, upon which the College case arose, expressed a purpose to reconstruct the corporation and convey property that did not belong to the State. It provided that the Governor and Council should appoint nine additional trustees, and that the nine new trustees and the other twelve should have and hold the legal title of the trust property then vested in the twelve. This provision purported to be a conveyance of a part of the legal title from the twelve to the nine. The authority for the appointment of the nine was not strengthened by legislative delegation. If there was a power of appointing the nine, the Legislature could have exercised it by naming the appointees in the Reconstruction Act, and could have appointed themselves or any number of other persons, without regard to the directions given by the donors of the trust fund. There is no constitutional provision dividing every trust fund into twenty-one equal parts, and authorizing a legislative conveyance of nine of the parts from the holder of the legal title to one or more persons selected by the Senate and House. Our decision, sustaining the legislative conveyance of 1816, was not based on any distinction between a power to convey a part of the property and a power to convey the whole. If, by New Hampshire law, the Act of 1816 was a valid conveyance of a part of the title from the twelve trustees to the nine appointed under the Act, then, by the same law, from 1784 to the adoption of the Federal Constitution, the members of the Legislature would have made a valid law by conveying to themselves the whole legal title of the College estate, real and personal, and all other property held in any incorporated or unincorporated trust, without trial, without notice, and without cause, and can make the unilateral conveyance whenever, by amendment or interpretation, the federal restriction is removed. This conception of the law-making character of a conveyance leaves no legal ground for denying the validity of the legislative conveyance of any property, or for asserting the validity of any conveyance not made by legislators. The administration of the law of trusts is either legislative or judicial;

it cannot be both. The assertion that it is legislative is a claim that the judicial administration of trusts has been illegal since 1784. And if the administration of fiduciary law is legislative, it remains to be shown how the administration of any law can be judicial.

In the College case, our decision that the conveyance of a part of the legal title and fiduciary right and duty from twelve trustees to nine others was an exercise of legislative power within the meaning of the second article of the State Constitution, was not and could not be overruled by the Federal Court. But it can be sustained only on the theory that the College property is the property of the State, or of a section of the public, and can be placed by the State in the hands of any number of State agents, whom the Legislature can elect, and whom the Legislature can remove from office at any time, without notice and without cause; and this position is untenable. No part of the title, legal or equitable, is held by the State or any of its territorial divisions. The legal title is in the trustees; and the equitable interest, free from the restriction of a State boundary, is in "youth of the Indian tribes," "English youth, and any others," duly qualified, and seeking the privileges furnished by the trustees' legal execution of the donors' educational purpose. Indirectly, the State, and other States, and the world may be benefited by gifts of property to the College; but the direct interest of persons entitled to be students of the College is an equitable title containing "private rights . . . which courts of justice are bound to notice,—rights which, if unjustly infringed, even by the trustees themselves, this court, upon a proper application, would feel itself bound to protect."¹ Although "the students are fluctuating," the proposition of the Federal Court that "no individual among our youth has a vested interest in the institution which can be asserted in a court of justice," that the "potential rights" of "the students who are to derive learning from this source" are "incapable of being asserted by the students," and that the students have no "rights to be violated,"² taken in the comprehensive sense in which it would be generally understood, is misleading. Let the trustees unanimously vote, under express statutory permission, to divert the trust fund from the lawful uses intended by the donors, and, upon complaint duly made³ by the students as plaintiffs in interest, it would be found that in-

¹ 1 N. H. 122.

² 4 Wheat. 641, 643.

³ Attorney-General v. Dublin, 38 N. H. 459; Hill v. Goodwin, 56 N. H. 441, 453; Boody v. Watson, 64 N. H. 162, 174; Attorney-General v. T. I. Co., 104 Mass. 239.

dividuals among our youth have an interest in the institution which the highest law of the State protects.

These rights of the students, like their rights of transportation on an incorporated railroad, are public in a certain sense. They are public in a larger sense than that mentioned in *O. S. Society v. Crocker*.¹ They are not derived from and do not depend upon the courtesy of the trustees. But they do not make the College property public in the sense in which the State House, State Library, and State prison are public. On its own land the State, by its legislative agents, can build a road for public use. On the College land, the Legislature cannot build a road, against the owner's objection, without paying the owner for a right of way. The State's ownership, which is the test of its power to use land as a highway without compensation, is the test of the legislative power of conveying the College property. The State not being the owner of that property, the Act of 1816, so far as it purported to convey a part of the College title, was void, and our decision, so far as it sustained the conveyance, was wrong. The Act, being an infringement of rights of property and contract reserved by the second, twelfth, fifteenth, twentieth, twenty-third, and thirty-seventh articles of the Bill of Rights, was not an exercise of legislative power.

When the distinction between the so-called imaginary existence of a corporate body and the actual existence of its lands, goods, and money is not clearly discerned, there often is an indistinct notion that a Legislature, empowered to destroy the owner's life without trial, can lawfully take the property and appropriate it to any use, before or after corporate dissolution, without compensation. But the death of the College corporation would not impair the students' equitable title to the College buildings and funds. This title has the same constitutional protection as any other private property not held in trust. As a way of necessity may be an incident of real estate, so the right of personal liberty includes self-defence and *habeas corpus*, as necessary means of exercising and enjoying it; and the right of property includes the right that an equitable interest shall not fail for want of trustees or other instrumentalities of administration. Adequate remedies, in general, are incidents of substantive constitutional rights. But an equitable title seems insecure when it is supposed to depend upon

¹ 119 Mass. 1, 24, 25.

a corporate holder of the legal title whose fictitious existence may be terminated at any time by voluntary surrender, judicial forfeiture, or legislative repeal. The Bill of Rights could have made a distinction between corporate and unincorporate property, or between property held by an incorporated or unincorporated trustee and other property held without a separation of its legal and equitable titles. A clause could have been inserted expressly excluding either from the general reservation of proprietary rights. In some jurisdictions, reported decisions have in effect introduced such a discrimination against the equitable owners of corporate property; and where this error is not distinctly rejected, the impression is by no means rare that for unknown reasons, and to an unknown extent, railroads and other estates held in trust by incorporated persons are peculiarly defenceless.

A belief that Dartmouth students could be deprived of the use and benefit of the College property after a repeal of the charter may have originated in the feudal doctrine of escheat, and the rule that a fee simple given to a corporation is vested in the members "in their politique or incorporate capacity created by the policy of man, and therefore" the gift is presumed to be upon the condition "that if such body politique or incorporate be dissolved, . . . the donor or grantor shall re-enter, for that the cause of the gift or grant faileth."¹ The statement that those founders of the College whose contributions were in money retain no interest in the property bestowed upon it, and "the donors of land are equally without interest, so long as the corporation shall exist,"² carries the implication that on a repeal of the charter the personal property would vest in the State, and the real would revert to the donors. On a repeal of the charter by Parliament before the Revolution, "the living donors," says Marshall, "would have witnessed the disappointment of their hopes."³ In 1817, when the case was decided in this court, and in 1819, when it was decided in the Federal Court, it was understood that escheat and reverter would close the College on a statutory dissolution of the corporation; and a majority of the Federal Court held that such a disaster was barred by the king's implied promise that the legislative power of repealing the charter should not be exercised, and by the federal security of that contract. But it is now settled that the diversion of the corporate property from its

¹ Co. Lit. 135.

² 4 Wheat. 641.

³ 4 Wheat. 643.

equitable owners by escheat and reverter after a charter repeal is an obsolete wrong.¹

If all the property of Dartmouth College were held, in its present educational trust, by one incorporated person in his corporate capacity, with no special provision for a successor, and all the property of Exeter Academy were held in a like trust for that school by the same person in his unincorporated capacity, with a like want of provision for the future, the dissolution of his corporation by death would have no more effect upon the College than his resignation would have upon the Academy. There would be no more forfeiture of either fund than of his own estate.

After corporate dissolution the College property would be as safe, and the execution of the trust as sure, as if the trustees had rejected the charter and accepted all property given them for the College, or the corporation had been legally incompetent to execute the trust,² and an unincorporated trustee, appointed in their place, had died. A suspension of the legislative power of repeal is not necessary to prevent the common-law disappointment of the donors' hopes; and the true construction of the State Constitution does not expose the College funds to the danger which the federal decision was intended to meet.

The king's contract, suspending the legislative power of repealing the charter, was implied as a means of rescuing the College from a liability to be destroyed by a diversion of the trust property from its intended use after a dissolution of the corporation. The diversion was characterized as perfidious. Indignation was roused by an imagined misappropriation morally equivalent to embezzlement. Thus, Chief-Justice Marshall said: "Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. . . . The contract would at that time have been deemed sacred by all. . . . This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. . . .

¹ *Curran v. Arkansas*, 15 How. 304, 310, 312; *Broughton v. Pensacola*, 93 U. S. 266, 268; *Greenwood v. Freight Co.*, 105 U. S. 13, 19; *School District v. Greenfield*, 64 N. H. 84, 85; *School District v. Concord*, 64 N. H. 235; *People v. O'Brien*, 111 N. Y. 1; 2 Kent. Com. 307, note *b*.

² *Chapin v. School District*, 35 N. H. 445, 453, 454, 456.

It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation."¹

The prevention of a common-law escheat and reverter of the property after a repeal of the charter, was a ground on which the moral right of repeal could be denied. So long as courts held that the trustees' loss of imaginary corporate life would be a common-law reason for inflicting upon the equitable owners a loss of the whole beneficial estate, a repeal of the charter would have been strongly opposed by a sense of justice. But the legal power of repeal can be denied only on legal grounds. A dissolution of the corporation by a voluntary surrender, judicial forfeiture, or legislative repeal of its charter would have raised the judicial question whether the supposed ruinous consequences of dissolution are imposed by the true rule of the common law. An affirmative answer would have raised the legislative question of changing such a rule; and in the decision of that question the Senate and House might be properly influenced by considerations of justice and expediency that do not show the legal construction of the charter and the Constitution. If the hopes and intentions of the donors would now be more exactly fulfilled, and the rights of the equitable owners more fully enjoyed, without incorporation than with it, this circumstance would not prove the legality of repeal. However great the wrongs which courts formerly thought the common law would commit when corporations were dissolved by surrender, forfeiture, or repeal, those wrongs were no evidence of an implied and void covenant made by the king in 1769, forever exempting the College charter from the legislative power of repeal vested at that time in Parliament, and afterwards in our Senate and House. There is no more implication of a contract on this subject in the incorporating law of the College than there would have been if the same law had been enacted by the Parliament of Great Britain or the Legislature of this State; and no more in a special Act of incorporation than in a general one. Under a general law, the deacons of the Congregational Church in Francestown are a corporation holding church property in trust.² If, on a dissolution of the corporation, the communion plate should be taken from its equitable owners and given to the State by an escheating rule of the common law, the

¹ 4 Wheat. 643, 644.

² G. L. of N. H., c. 153, § 6; *Holt v. Downs*, 58 N. H. 170, 171.

wrong that ought to be prevented by a repeal of that rule would be no evidence of an implied legislative contract that the wrong should be prevented by suspending the power of repealing the incorporating statute.

"A corporation, by the very terms and nature of its political existence, is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. . . . It would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence." "The dissolution of the corporation . . . cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company, . . . any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims . . . in any mode permitted by the local laws."¹

"The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws."² In that case it was not doubted that the State could repeal the charter of a bank of which it was sole stockholder. The State contended that when it destroyed the corporation, the contracts made by the bank would no longer be in existence, and could not be enforced against the corporate property, which, upon the repeal of the charter, would revert, so far as it was realty, to the grantors, and would escheat, so far as it was personalty, to the State. But the court held that the property was charged with a trust which the dissolution of the corporation would not destroy, and that the law, which never allows a trust to fail for want of a trustee, would see to the execution of the trust in behalf of creditors. Repeal does not impair the obligation of contracts which the law enforces after repeal. The trust which holds the College property for the use and benefit of students is a contract made by the donors and the trustees. And as our common law would enforce their contract, and preserve the rights of the equitable owners, after dissolution as well as before, and the State Constitution does not authorize the Legislature to impair that contract or those rights, the hopes of the donors cannot be frustrated by legislation during the life of the corporation or afterwards,

¹ *Mumma v. Potomac Co.*, 8 Pet. 281, 287, 286.

² *Curran v. Arkansas*, 15 How. 304, 319.

and no argument can be drawn from the common-law consequences of repeal. It being settled that escheat and reverter would not follow dissolution, the high moral ground on which the Federal Court held that the repealing power is suspended, does not exist. There never was any constitutional ground on which the doctrine of suspension could be maintained; and when judges corrected their views of the common law and vindicated its justice, nothing was left to support the constitutional error in a court of conscience.

If the ancient common-law consequences of dissolution were so grievous as to be considered proof of a bargain suspending the legislative power of repeal, why were they not proof of a bargain suspending the judicial power of forfeiture and the trustees' power of surrender? Was it judicial discretion that left the corporation exposed to two modes of destruction? The grantees of the charter were parties to whatever contract was made, and were endowed with contractual capacity. The court was not one of the parties. If the judicial power of forfeiture is saved only because the king's contract bound nobody but himself and those claiming a repealing power by, from, or under him, it must be admitted that the obligation of his contract would not be impaired by an exercise of some other repealing power than his. As it is not claimed that he could suspend any other repealing power than his own, and a repeal of the charter would have been an exercise of the ordinary legislative power of Parliament, his promise to abstain from doing what he could not do would have been as nugatory as his illegal and void contract to suspend the legislative power of Parliament.

"New Hampshire succeeds," it was said by Chief-Justice Marshall, to the "rights and obligations" of the Crown.¹ The Legislature cannot impair the obligation of a contract made by the king or any other person. Its impairment being retrospective, and being in other respects a violation of our Bill of Rights, is not legislative in the true legal sense in which the bill expounds the second article of the Constitution. But New Hampshire did not succeed to all the king's obligations. The State was not bound to pay his debts, and was not his successor in any sense that limits the law-making power of repeal. In the exercise of a power strictly legislative, Parliament (Commons, Lords, and king) could have enacted and repealed the incorporating law called the College Charter. Their repeal of it in 1770 would have dissolved the corporation.

¹ 4 Wheat. 643.

By an anomaly of the English government, the king could make, and could not repeal, the Act of Incorporation.

The English Bill of Rights is the substance of a Revolution that settled a disputed boundary of the royal prerogative. It effectually demolished "the doctrine of *non obstante*'s, which sets the prerogative above the laws," and "maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal."¹ Since the enactment of the bill in 1689, the sovereign has had no authority to exempt from legislative repeal a college charter granted either by the king or by Parliament. In the list which the bill gives of the violations of law for which James II. was deposed, the first is his usurpation of the dispensing power. After reciting that he had endeavored "to subvert and extirpate . . . the laws and liberties of this kingdom by assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of Parliament, . . . and by divers other arbitrary and illegal courses, . . . all which are utterly and directly contrary to the known laws and statutes and freedom of this realm," the bill declares "That the pretended power of suspending of laws or the execution of laws by regal authority, without consent of Parliament, is illegal; that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." It enacts that all the rights and liberties which it asserts and declares "are the true, ancient, and indubitable rights and liberties of the people of this kingdom." The twelfth article provides that, without parliamentary authority, "no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect." With these articles are others that changed the dynasty. To the whole was given "the force of a law made in due form by authority of Parliament."

On the death of Anne without issue, in 1714, the Crown passed to the house of Hanover by the Act of Settlement of 1701. By the fourth section of that Act, after a preamble reciting that "the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws," "all the laws and statutes of this realm for securing . . . the rights and liberties of the people thereof, and all other laws and statutes of the same now in force," are ratified and confirmed.

¹ 1 Bl. Com. 342; 4 Ib. 440.

It was not by accident that these metes and bounds were incorporated in the foundations of the monarchy. "It had become indispensable to have a sovereign whose title to his throne was strictly bound up with the title of the nation to its liberties." In the Bill of Rights the dynastic change and the king's inability to suspend the law were joined, and in the Act of 1701 their union was confirmed, in order that the question which had been in dispute between the Stuarts and the people might not again be stirred. In 1760 this Revolution-settlement, continuing to withhold the Crown from the lineal heir, carried it to George III., in whose name the Dartmouth charter was granted in 1769.

"We," says James II. in 1687, "have thought fit, by virtue of our royal prerogative, to issue forth this our declaration of indulgence. . . . We do . . . declare that it is our royal will and pleasure that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical . . . be immediately suspended, and the further execution of the said penal laws, and every of them, is hereby suspended."¹ "This," says Powell, J.,² "is a dispensation with a witness. It amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no Parliament; all the legislature will be in the king."

The Stuart precedents of special dispensation concur with the general declaration of indulgence in leaving no suspension of law to be supplied by inference.³ In *Sclater's* case the form is, "We do hereby of our further special grace, certain knowledge, and mere motion, give and grant unto the said Edward Sclater our royal licence and dispensation to" violate certain laws, "without incurring any pain, penalty, loss, . . . or disability by reason thereof; . . . and we do hereby grant, require, and command . . . that this our royal licence . . . and dispensation . . . shall be valid in law, and allowed by and in all our courts, . . . notwithstanding the Acts of Parliament hereinbefore mentioned, . . . and any other Act, statute, canon, constitution, provision, or restriction to the contrary thereof in any wise notwithstanding."⁴

¹ *King v. Sanicroft*, 12 St. Tr. 183, 232, 235.

² *Ib.* 427.

³ *Godden v. Hales*, 11 St. Tr. 1166, 1178-1186; 1 *Gutch's Collectanea Curiosa*, 294.

⁴ 1 *Gutch's Coll.*, 290.

Had an exemption from repeal been granted in the Dartmouth charter according to the tenor of the familiar precedents of dispensation *non obstante*, and in the terms of an express contract, it would have taken some such form as this: "We do hereby, of our further special grace, certain knowledge, and mere motion, for us, our heirs, and successors, give and grant unto the said trustees of Dartmouth College, and to their successors forever, that these our letters patent shall never be repealed by an exercise of legislative power, in whatever person or persons said power may be vested; and it is our royal will and pleasure that the legislative power of repealing said letters patent be immediately suspended; and said power is hereby forever suspended; and we do hereby grant, require, and command that this our royal exemption and dispensation shall be valid in law, and allowed by and in all our courts; notwithstanding the Act of Parliament 1 W. & M. sess. 2, c. 2, known as the Bill of Rights; and notwithstanding § 4 of the Act of Parliament 12 & 13 W. III. c. 2, known as the Act of Settlement; and any other Act, statute, constitution, provision, restriction, or law to the contrary thereof in anywise notwithstanding; and this grant is a contract binding and disabling the possessors of legislative power forever.

This grant, if valid, would have suspended the fundamental law which authorizes Parliament to legislate. It would have been a dispensation and usurpation not less explicit than any of those for which James II. was dethroned. There could be no plainer violation of the Bill of Rights, in which the illegality of royal dispensations is set forth as a dominant principle of the Constitution and a justification of the Revolution. Except as a forfeiture of the Crown, the suspending contract, written in the charter by the king, would have had no effect. It would have been void in the most unqualified sense of invalidity known to English or American law. The charter would have been as repealable by the legislative power of Parliament as if that power, instead of being expressly suspended, had been expressly reserved. No property would have been given to the College on the faith of a contract, the illegality and nullity of which had ceased to be an open question eighty years before the date of the charter.

The charter contains no exemption from repeal, and no clause or word capable of being understood as an allusion to the subject. Neither in that document nor elsewhere is there any evidence of the grantor's intention to attempt a suspension of the legislative power of repeal, which was vested at the date of the charter in Par-

liament, and afterwards in our Senate and House. It was not supposed by him or his grantees that an implied dispensation would be more effective than an express *non obstante*, or that an Act of Incorporation, which could not be made irrepealable by king, Lords, and Commons, could be made irrepealable by the king alone. He and his grantees well knew that his contractual suspension of repealing power, in whatever words expressed, or from whatever evidence implied, would insure the immediate repeal of the charter, and imperil the contracting parties, and all others conspiring with them to reverse the Revolution. There is no rule of construction, and no presumption of law or fact, on which a court can find an implied contract of the king to suspend the English Constitution and reopen the question which the nation had settled by expelling the Stuarts and transferring the Crown to his family, with an express exclusion of suspending power.

In 1769 men could be found as servile as any of those who drew the Stuart dispensations, and as ready for safe employment. But no one would have engaged, as principal or accessory, in a regal suspension of legislative power with any hope of success or safety, or imagined that the offence would be implied from a mere Act of Incorporation. It was physically possible for the king to insert in the Dartmouth charter the terms of a contract assuming to exempt the grantees from the legislative power of repeal; but he had no motive to unsettle his own title by a useless violation of the Bill of Rights and the Act of 1701. He knew why he reigned instead of Charles Edward. He called himself "a Whig of the Revolution." There was nothing to induce any one to ask a charter that would be repealed as soon as it came to the knowledge of Parliament, and would be conclusive evidence that its acceptors had aided and abetted in a lawless attempt to change the government. When so fruitless and hazardous an enterprise is inferred without proof, the presumptions of sanity and legal purpose are set aside without gaining any ground of validity or legality. As a matter of law and a matter of fact, an exemption is not proved. It is as certain that it never existed in the intention and understanding of the parties¹ as that it was never signed or written or spoken by them or by any one of them. The subject is one on which public opinion, in England and America, has been so unanimous and vehement since 1688 that no successor of James II. would have dared to grant, and

¹ *Delano v. Goodwin*, 48 N. H. 203, 206.

no grantee named in the College charter would have dared to accept, a dispensation *non obstante*; and the grant that would have been unavailing if it had been put in writing, would not be effectual if it were implied. The law does not infer and enforce a contractual suspension and violation of itself.

Since 1688 the right to the Crown has been derived from an Act of Parliament. The grant of the College charter was an exercise of authority conveyed to the grantor, as a part of his office, by a statute that withheld the prerogative of suspending the repealing power. His want of suspending capacity is the beginning of the short chain of the grantees' corporate title. If the English Revolution had not occurred, if the Bill of Rights and the Act of 1701 had not been passed, and the king's dispensing power, instead of being renounced by organic laws, had been established by them; and the College charter, instead of being silent on the subject, had contained a promise of exemption from the legislative power of repeal, — there would have been some ground for the claim that a repeal would impair the obligation of a contract. Upon the true view of the State Constitution, the charter, and the effect of corporate dissolution, the constructive suspension of repealing power is an effort to avert a danger that does not exist, by setting up a void contract that was not made.

CHARLES DOE.

It has been thought desirable to add a brief statement of the Dartmouth College Case.

It was an action of trover by the trustees of Dartmouth College against William H. Woodward, for the College records, the original charter, the common seal, and divers books of account. Woodward was the secretary and treasurer of the trustees of Dartmouth *University*. His right to the property depended on the validity of certain Acts of the Legislature of New Hampshire purporting to amend the charter of Dartmouth College and to change its name to Dartmouth University.

In the Supreme Court of New Hampshire the facts were agreed upon by the parties, and put in the form of a special verdict.

The material facts were as follows: —

Prior to the chartering of Dartmouth College, Rev. Dr. Eleazer Wheelock had founded at his own expense, on his estate in Connecticut, a charity school for Indians, and had maintained it by contributions given at his solicitation. Contributions had been made and were then being solicited in England for this purpose, and funds thus given were in the hands of trustees in England, appointed by Dr. Wheelock to

act in his behalf. Dr. Wheelock had made his own will, devising the existing charitable funds in trust to continue the school, and appointing trustees in America for that purpose. The proprietors of lands in the western part of New Hampshire promised to give large tracts, provided the school should be located in their section, and its benefits extended so as to include English youth as well as Indians. Dr. Wheelock, before removing the school, applied to the Crown for a charter; and the king, in 1769, granted the charter of Dartmouth College.

The charter recites, in substance, the facts above stated; ordains that there be a college erected in New Hampshire by the name of Dartmouth College, for the education of Indian and English youth; and that there shall be in said College "from henceforth and forever" a body corporate and politic, consisting of trustees of said College ("the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more"). The charter expresses the intent that the corporation shall have "perpetual succession and continuance forever." The charter appoints Dr. Wheelock and eleven other persons as trustees. From the recitals in the preamble it is to be presumed that not less than six of the eleven were the same persons who had already been named as trustees by Dr. Wheelock in his will. Seven trustees constitute a quorum. The board of trustees fill vacancies in their own number. The usual corporate privileges and powers are conferred upon the trustees and "their successors forever." The charter styles Dr. Wheelock "the Founder of said College," and appoints him president.

It did not appear, and was not claimed, that the Crown or the Province made any donations, or proffered any endowment, prior to, or simultaneously with, the grant of the charter. The funds turned over to the College upon incorporation consisted entirely of the private gifts contributed by Dr. Wheelock and by other persons at his request. Lands were given to the College by Vermont in 1785 (sixteen years after the incorporation), and by New Hampshire in 1789 and 1807.

June 27, 1816, the Legislature of New Hampshire passed "An Act to amend the charter and improve the corporation of Dartmouth College." The preamble styles Dartmouth "the college of this State." By this Act and two later Acts of the same year, the following changes were made in regard to the College:—

1. The name is changed to "The Trustees of Dartmouth University."
2. The number of trustees is increased from twelve to twenty-one, of whom nine shall constitute a quorum. The nine new trustees are to be appointed by the Governor and Council.
3. The trustees shall have power to organize colleges in the university; also to establish an institute, and elect fellows and members thereof.
4. A board of overseers, twenty-five in number, is created; the members to be appointed by the Governor and Council. The overseers are

to have power to disapprove and negative votes of the trustees relative to the appointment and removal of president, professors, and other officers; relative to salaries; and also relative to the establishment of colleges and professorships, and the erection of new college buildings.

5. Each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

The trustees of Dartmouth College refused to accept, or act under, the Acts of 1816.¹

In the Supreme Court of New Hampshire the counsel for Dartmouth College argued that the Acts of 1816 were in conflict both with the Constitution of the State and the Constitution of the United States. As to the State Constitution, it was claimed that the Acts conflicted with several provisions, but especially with the provision that no subject shall be "deprived of his property, immunities, or privileges, . . . but by judgment of his peers or the law of the land." As to the United States Constitution, the Acts were claimed to be a violation of the provision that no State shall pass any law "impairing the obligation of contracts."

The Supreme Court of New Hampshire² gave judgment for the defendant, holding that the Acts were not in conflict with either the State or the United States Constitution. This decision, so far as it related to the State Constitution, was final; but the question relative to the Federal Constitution was carried to the United States Supreme Court by the plaintiffs on a writ of error.

The Supreme Court of the United States³ held that the Acts of 1816 were in conflict with the above-mentioned clause of the United States Constitution, and consequently reversed the judgment of the State Court.

¹ Eight or nine of the old board declined to accept or act under the new statutes. It was, in 1815-1816, matter of common knowledge that there was a schism in the board of trustees. In 1815 the board, by a vote of eight to four, removed Rev. Dr. John Wheelock, the son of the founder, from the presidency. The general belief was that the nine new trustees, appointed by the Governor under the Act of 1816, would side with the friends of Dr. Wheelock, thus converting the minority of the old board of twelve into a majority of the new board of twenty-one.

² 1 N. H. 111; also reported, with the arguments, 65 N. H. 473.

³ 4 Wheaton, 518.

NOVATION.¹

WHENEVER there is a change in one of the parties, or in the form of an obligation the substance of which remains the same, there is said to be a novation. We have borrowed the name from the Roman law, but the institution itself is of native growth. Novation in the Roman law was effected by the *stipulatio*. But we have nothing in our law corresponding to the Roman stipulation. Novation, by a change in the form of the obligation, as by the substitution of a specialty for a simple contract, has existed in English law from time immemorial under the name of merger. But our novation by a change of parties, whether by the intervention of a new creditor (*novatio nominis*) or by the substitution of a new debtor (*novatio debiti*), is a modern institution. The earliest judicial recognition of the doctrine seems to be the oft-quoted opinion of Mr. Justice Buller in 1759:—

“Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100: B's debt is extinguished, and C may recover the sum against A.”

That this doctrine had no place in the ancient common law appears clearly from the following case of the year 1432:—

“Rolf. In case B is indebted to C in £20, and A buys a chattel of B for £20, so that A is his debtor for so much; if A comes and shows C how B is indebted to C in £20, and how A is indebted to B in £20 by reason of the purchase, and A grants to C to pay C the £20 which A owes, and that B shall be discharged of his debt to C, and C agrees to this, and B also, A shall now be charged to C for this debt by his contract and own act.

“Quod COTESMERE, J., *negavit*, and said, although all three were of one accord that A should pay the money to C, this is only a *nudum pactum*, so that for this C cannot have an action.

“Rolf. I say this is not a *pactum nudum*, but *pactum vestitum*, for there was a contract between B and C, and also between A and B, so that this accord between them is not *pactum nudum*. But when I grant to pay a

¹ The writer desires to acknowledge his obligations to Mr. Edmund A. Whitman, whose article on Novation in 16 Am. and Eng. Encyc. of Law, 862, is, by far, the most valuable essay upon the subject in our language.

certain sum to a man, or when I grant to pay the duty of another to whom I am not indebted, that is *pactum nudum*, because in the first case there is no contract, and in the last case there is no contract or duty between me and him for whom I grant to pay, so that for this he cannot have an action. But in my case there is a contract by the duty between A and B for whom A grants, and between B and C to whom A grants, to pay the debt. So *pactum vestitum*, for which he shall have an action, wherefore, etc.

"COTESMERE, J. It is *nudum pactum* in both cases, for although all three are agreed that A shall pay this debt for B, still B is not discharged of his debt in any manner. *Quod TOTA CURIA concessit.*"¹

At the time of this decision B, the old obligor, could be discharged only by a release under seal, or by an accord and satisfaction; that is, an accord fully performed. Furthermore, the action of *assumpsit* being then unknown, the new obligor must be liable, if at all, in debt. But there could be no debt in the absence of a *quid pro quo*, and A, the new obligor, received nothing in exchange for his assumption of B's obligation. The two essential features of a novation—namely, the extinguishment of the original obligation, and the creation of a new one in its place—were therefore both wanting in the case supposed. In other words, novation by simple agreement of the parties was at that time a legal impossibility.

The first step towards the modern novation is illustrated by the case of *Roe v. Haugh*² (1697). The count alleged that B was indebted to C in the sum of £42, and that A, in consideration that C would accept A as his debtor for the £42 in the room of B, undertook and promised C to pay him the said £42, and that C, trusting to A's promise, accepted A as his debtor. But there was no averment that C discharged B. After a verdict and judgment for C, the plaintiff, it was insisted in the Exchequer Chamber "that this was a void *assumpsit*; for except B was discharged, A could not be chargeable." Three judges were of this opinion. "But POWIS, B., NEVILL, J., LECHMERE, B., and TREBY, C. J. [thought?], that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of A, for as such it would not bind him except B was discharged; but they would construe it to be a mutual promise, viz., that A promised to C to pay the debt of B, and C on the other

¹ 1 Y. B. 11 H. VI., f. 35, pl. 30.

² 12 Mod. 133; 1 Salk. 29; 3 Salk. 14 s. c.

hand promised to discharge B, so that though B be not actually discharged, yet if C sues him, he subjects himself to an action for the breach of his promise."

As a consequence of the introduction of the action of *assumpsit*, there was in this case one of the marks of a novation, — the liability of a new obligor; but the other, the liberation of the old obligor, was still wanting, for the creditor might, notwithstanding his agreement, sue on the old debt. His right of action, however, must be in the long run a barren one; for whatever he recovered he must refund as damages for the breach of his promise not to sue. Equity, to prevent the scandal of two actions where there ought to be none, would have enjoined the first action; and it is not surprising that the common-law judges should ultimately have allowed the promise not to sue to operate as a legal bar, on the principle of avoiding circuitry of action. In *Lyth v. Ault*,¹ a creditor of two persons agreed to take the obligation of one of them in the place of his claim against them both. PARKE, B., said, p. 674: "As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action."²

As soon as this final step was taken, the process of effecting a novation became extremely simple. To convert a claim of C against B into a claim of C against A it is only necessary for C and A to enter into a bilateral contract, in which C promises never to sue B, and A promises to pay to C the amount due from B. C's promise operating as an equitable release, now pleadable as a defence at law, the claim of C against B disappears, while A's promise creates in its place the new claim of C against A.

The difficulty in novation cases is therefore no longer one of law, but of fact: namely, Has the creditor entered into the bilateral contract with the new debtor? This question has come up frequently in recent times when a new corporation has acquired the assets and assumed the liabilities of an old company.³

¹ 7 Ex. 669.

² See also *Bird v. Gammon*, 3 B. N. C. 883; *Bilborough v. Holmes*, 5 Ch. D. 255; and especially *Corbett v. Cochran*, 3 Hill, S. C. 41, where the rationale of novation is admirably described.

³ The evidence was sufficient to establish a novation in *Re Times Co.*, 5 Ch. 381; *Re Anchor Co.*, 5 Ch. 632; *Re Medical Co.*, 6 Ch. 362; and *Miller's Case*, 3 Ch. Div. 391, where accordingly the old company was discharged; and in *Re British Co.*, 12

The same question arises still oftener when a partnership transfers its assets to a new firm or to an individual, and the transferee assumes the payment of the debts of the transferor.¹ And there are, of course, many other occasions when it may be desirable to bring about a substitution of debtors.²

We have thus far considered only novations effected by a change of debtors (*novatio debiti*). But a novation may also be accom-

W. R. 701; *Burns v. Grand Lodge*, 153 Mass. 173, where the new company was held liable to the creditor.

The novation was not proved in *Re Manchester Association*, 5 Ch. 640; *Griffith's Case*, 6 Ch. 374; *Conquest's Case*, 1 Ch. Div. 334; *Blundell's Case*, Eur. Ass. Arb. 39; *Coghlan's Case*, Eur. Ass. Arb. 31; *Bristol Co. v. Probasco*, 64 Ind. 406, where, therefore, the old company continued liable; and in *Re Commercial Bank*, 16 W. R. 958; *Re Smith*, 4 Ch. 662; *Re Family Society*, 5 Ch. 118; and *Re India Co.*, 7 Ch. 651, where the new company was not chargeable.

¹ The reported cases of novation under these circumstances are legion; the following may serve as illustrations. The novation being complete, the old firm was discharged in *Thompson v. Percival*, 5 B. & Ad. 925; *Lyth v. Ault*, 7 Ex. 669; *Bilborough v. Holmes*, 5 Ch. D. 255; *Ludington v. Bell*, 77 N. Y. 138; and the transferee was charged in *Ex parte Lane*, De Gex, 300; *Rolfe v. Flower*, L. R. 1 P. C. 27; *Lucas v. Coulter*, 104 Ind. 81. On the other hand, the evidence being insufficient to establish a bilateral agreement between the creditor and the transferee of the firm, there was in the following cases no novation: *Thomas v. Shillibeer*, 1 M. & W. 124; *Eagle Co. v. Jennings*, 29 Kas. 657; *Wildes v. Fessenden*, 4 Met. 12.

² The mutual assent to a novation being proved, the old debtor was discharged in *Brown v. Harris*, 20 Ga. 403; *Anderson v. Whitehead*, 55 Ga. 277; *Struble v. Hake*, 14 Ill. Ap. 546; *McClellan v. Robe*, 93 Ind. 298; *Foster v. Paine*, 63 Iowa, 85; *Besshears v. Rowe*, 46 Mo. 501; *Thormap v. Polys*, 13 N. Y. Sup. 823; and the new obligor was held liable in *Browning v. Stallard*, 5 Taunt. 450; *Goodman v. Chase*, 1 B. & Ald. 297; *Bird v. Gammon*, 3 B. N. C. 883; *Butcher v. Steuart*, 11 M. & W. 857; *Re Rotheram*, 25 Ch. Div. 103, 109; *Carpenter v. Murphree*, 49 Ala. 84; *Underwood v. Lovelace*, 61 Ala. 155; *Barringer v. Warden*, 12 Cal. 311; *Welch v. Kenny*, 49 Cal. 49; *Packer v. Benton*, 35 Conn. 343; *Karr v. Porter*, 4 Houst. 297; *Harris v. Young*, 40 Ga. 65; *Edenfield v. Canady*, 60 Ga. 456; *Runde v. Runde*, 59 Ill. 98; *Grover v. Sims*, 5 Blackf. 498; *Walker v. Sherman*, 11 Met. 170; *Wood v. Corcoran*, 1 All. 405; *Osborn v. Osborn*, 36 Mich. 48; *Mulcrone v. American Co.*, 55 Mich. 622; *Yale v. Edgerton*, 14 Minn. 194; *Wright v. McCully*, 67 Mo. 134; *Smith v. Mayberry*, 13 Nev. 427; *Van Epps v. McGill*, Hill & D. 109; *Bacon v. Daniels*, 37 Oh. St. 279; *Ramsdale v. Horton*, 3 Barr. 330; *Corbett v. Cochran*, 3 Hill, S. Ca. 41; *Scott v. Atchison*, 36 Tex. 76; *Williams v. Little*, 35 Vt. 323.

The fact of novation was not proved in *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, 4 B. & C. 163; *Fairlie v. Denton*, 8 B. & C. 395; *Brewer v. Winston*, 46 Ark. 163; *Gyle v. Schoenbar*, 23 Cal. 538; *Decker v. Shaffer*, 3 Ind. 187; *Davis v. Hardy*, 76 Ind. 272; *Jacobs v. Calderwood*, 4 La. An. 509; *Jackson v. Williams*, 11 La. An. 93; *Choppin v. Gobbold*, 13 La. An. 238; *Rowe v. Whittier*, 21 Me. 545; *Curtis v. Brown*, 5 Cush. 488; *Furbush v. Goodnow*, 98 Mass. 296; *Caswell v. Fellows*, 110 Mass. 52; *Halsted v. Francis*, 31 Mich. 113; *Johnson v. Rumsey*, 28 Minn. 531; *Vanderline v. Smith*, 18 Mo. Ap. 55; *Jawdon v. Randall*, 47 N. Y. Sup'r Ct. 374; *Styron v. Bell*, 8 Jones, N. C. 222; *Jones v. Ballard*, 2 Mill. C. R. 113; *Lynch v. Austin*, 51 Wis. 287; *Spycher v. Werner*, 74 Wis. 456.

plished by the substitution of a new creditor for an old one (*novatio nominis*). The problem is here how to convert a claim of X against Z into a claim of Y against Z. The desired result is commonly attained by two successive transactions. In the first place, X assigns to Y his claim against Z. This assignment, being legally the grant of an irrevocable power of attorney to Y to sue Z in the name of X, makes Y practically *dominus* of the claim. But it does not create a direct relation between Y and Z. Even under codes allowing Y to sue in his own name, Y is not a true successor to X.¹ Y, however, being *dominus* of the old claim against Z, may enter into a bilateral contract with Z, Y promising never to enforce the old claim in consideration of Z's direct promise to him to pay him the amount of the old claim. The promise of Y operates as an equitable release of the old claim of X against Z, and at the same time is a valid consideration for the new claim of Y against Z. The novation is therefore complete. The right of Y to bring an action in his own name against Z, independently of any statute permitting an assignee to sue in his own name, because of Z's direct promise to Y, has been almost everywhere recognized.² An instructive illustration of this form of novation is found in the custom by which insurance companies assent to the assignment of their policies.³

The practical differences between the position of an assignee of the old debt and a promisee under the new promise are considerable.

¹ 3 Harvard Law Review, 341; see Moyle, Justinian, 466.

² *Israel v. Douglas*, 1 H. Bl. 239 (justly criticised, because the count was not in special *assumpsit*); *Moore v. Hill*, Peck's Add. Cas. 10; *Surtees v. Hubbard*, 4 Esp. 203; *Lacy v. McNeill*, 4 D. & Ry. 7; *Wilson v. Coupland*, 5 B. & Al. 228; *Noble v. Nat. Co.*, 5 H. & N. 225; *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Tiernan v. Jackson*, 5 Pet. 580 (*semble*); *Howell v. Reynolds*, 12 Ala. 128; *Indiana Co. v. Porter*, 75 Ind. 428; *Cutters v. Baker*, 2 La. An. 572; *Lang v. Fiske*, 11 Me. 385; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 Me. 484; *Farnum v. Virgin*, 52 Me. 576; *Getchell v. Maney*, 69 Me. 442, 443 (*semble*); *Barger v. Collins*, 7 Har. & J. 213; *Austin v. Walsh*, 2 Mass. 401; *Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Armsby v. Farnam*, 16 Pick. 318; *Bourne v. Cabot*, 3 Met. 305; *Eastern Co. v. Benedict*, 15 Gray, 289; *Blair v. Snover*, 5 Halst. 153; *Currier v. Hodgdon*, 3 N. H. 82; *Wiggin v. Damrell*, 4 N. H. 69; *Thompson v. Emery*, 27 N. H. 269; *Boyd v. Webster*, 58 N. H. 336; *Compton v. Jones*, 4 Cow. 13; *Quinn v. Hanford*, 1 Hill, 82; *Phillips v. Gray*, 3 E. D. Sm. 69; *Ford v. Adams*, 2 Barb. 349; *Esling v. Zantzinger*, 13 Pa. 50; *Clarke v. Thompson*, 2 R. I. 146; *DeGroot v. Darby*, 7 Rich. 118; *Anderson v. Holmes*, 14 S. Ca. 162; *Mt. Olivet Co. v. Shubert*, 2 Head, 116; *Wescott v. Potter*, 40 Vt. 271, 276; *Bacon v. Bates*, 53 Vt. 30; *Brooks v. Hatch*, 6 Leigh, 534.

³ *Wilson v. Hill*, 3 Met. 66; *Fuller v. Boston Co.*, 4 Met. 206; *Kingsley v. N. E. Co.*, 8 Cush. 393; *Phillips v. Merrimack Co.*, 10 Cush. 350; *Burroughs v. State Co.*, 97 Mass. 359; *Barnes v. Co.*, 45 N. H. 21, 24.

(1) The assignee must sue subject to any set-off which the debtor may have against the assignor; the promisee under the new promise cannot be affected by any such set-off.

(2) If the old claim was in the form of a specialty, the assignee must sue in covenant, but the new promisee must sue in *assumpsit*; the period of limitation would be different accordingly in the two cases.¹

(3) By statute in certain jurisdictions unrecorded assignments of wages are invalid against a trustee process. But the new promisee cannot be affected by these statutes, for the novation destroys the claim of the employee, so that there is nothing due to him from the employer.²

Although a substitution of creditors is in general to be worked out by means of an assignment of the claim and a bilateral contract between the assignee and the debtor, a *novatio nominis* may in certain cases be accomplished in a different mode. A creditor, X, who desires to make a gift to Y of his claim against Z has only to enter into a bilateral contract with Z, X promising never to sue Z, in consideration of Z's promise to him to pay the amount of the debt to Y. Y, the donee, it is true, is not the promisee; but inasmuch as the promise is made exclusively for his benefit, he should be allowed to sue upon it, if not at law, at least in equity. Even in England, where the rule denying an action to any one but the promisee is most rigidly enforced, there are several cases where the donee in the case supposed has been allowed to recover against Z.³ The reasoning in these cases, it must be admitted, is far from satisfactory, the courts in some of them having so far lost sight of fundamental distinctions as to call Z, the debtor, a trustee.⁴

¹ Warren v. Wheeler, 21 Me. 484; Compton v. Jones, 4 Cow. 13.

² Denver Co. v. Smeeton (Colo., 1892), 29 Pac. R. 815; Stinson v. Caswell, 71 Me. 510; Clough v. Giles, 64 N. H. 73. But see Knowlton v. Cooley, 102 Mass. 233; Mansard v. Daley, 114 Mass. 408.

³ McFadden v. Jenkyns, 1 Ph. 153; Rycroft v. Christy, 3 Beav. 238; Meert v. Moessard, 1 Moo. & P. 8; Roberts v. Roberts, 12 Jur. N. S. 971; Parker v. Stone, 38 L. J. Ch. 46. See also the American cases, Eaton v. Cook, 25 N. J. Eq. 55; Minchin v. Merrill, 2 Edw. 333, 339; Hurlbut v. Hurlbut, 49 Hun, 189. The evidence was insufficient to prove the creditor's agreement to give up his claim against the debtor in *Re Caplen's Estate*, 45 L. J. Ch. 280, and *Evans's Estate*, 6 Pa. Co. 437. It was decided, also, that there was no novation in *Gaskell v. Gaskell*, 2 Y. & J. 502, and *Chandler v. Chandler*, 62 Ga. 612; but these cases seem to be erroneous. The former was criticised adversely in *Vandenberg v. Palmer*, 4 K. & J. 204, 214, 215.

⁴ See especially *McFadden v. Jenkins*, 1 Ph. 153; Ames, *Cases on Trusts* (2d ed.), 47, 48, n. 1.

We have hitherto dealt with the problem of novation in its simplest form. Given a debt from B to C, in what way could a new creditor be substituted in the place of C (*novatio nominis*), or a new debtor in the room of B (*novatio debiti*)? But it often happens that there are two debts at the outset, both of which it is desired to suppress in the formation of a third. A, for example, may be indebted to B, and B to C, and the three parties may wish to extinguish the claim of B against A, and that of C against B, leaving in their stead a claim of C against A. This object is easily attained at the present day. Let C enter into a unilateral contract with B, C promising never to sue B, in consideration of the assignment to C of B's claim against A. Then let C, who is now *dominus* of the claim of B against A, make a bilateral contract with A, C promising never to enforce the assigned claim against A in consideration of A's direct promise to C to pay him the amount of that claim. C's promise to B, operating as an equitable release, discharges the claim of C against B; and C's promise to A, likewise operating as an equitable release of the assigned claim of B against A, that is discharged also, and the new claim of C against A alone remains.

In the process just described, the unilateral contract between C and B precedes the bilateral contract between C and A, and the presence of all three parties is not required. But this compound novation may be effected in another mode, which does require the presence of A, B, and C, and involves the contemporaneous formation of three bilateral contracts as follows:—

- (1) Between B and A, B promising to give up his claim against A for A's promise to him to pay to C the latter's claim against B.
- (2) Between C and B, C promising to give up his claim against B for B's promise to give up his claim against A.
- (3) Between C and A, C agreeing to give up his claim against B for A's direct promise to C to pay him the amount of that claim.¹

In other words, each of the three makes his own promise to do the same thing, in consideration of a counter promise from each of the others. The promises not to enforce the old claims have

¹ Since A, in the case above supposed, assumes the liability of B to C, there is a *novatio debiti*. A's promise might have taken the form of an undertaking to pay to C his own debt to B, which would have made a *novatio nominis*.

the effect of extinguishing those claims, and, as in the other process, the promise of A to pay C alone remains.¹

The novation which results from the substitution of an obligation of A to C, in the place of the two debts of A to B and B to C, may be accomplished in still another mode, if, in addition to the change of parties, there is also a change in the form of the obligation. The parties, for example, often prefer to put the new obligation into the form of a covenant or negotiable note. In such cases, whether the novation is worked out by successive or by contemporaneous agreements, none of the agreements is bilateral. If B assigns to C his claim against A for C's promise to release B, and A subsequently gives his note or covenant to C, there is first the unilateral contract binding C to B, and afterwards A's specialty obligation to C, the giving of which forms the consideration for C's unilateral contract binding him not to enforce the assigned claim of B against A. If, on the other hand, by the contemporaneous assent of A, B, and C, A gives his note or covenant to C, we have, as before, the specialty obligation of A to C, the giving of which forms the consideration for two unilateral contracts, one with B binding him not to sue A, and one with C binding him not to sue B. It is further to be noticed that the obligation of A to C being an abstract promise to pay C a fixed amount of money, and not a concrete promise to pay C either what A owes B or what B owes C, the difference between a *novatio debiti* and a *novatio nominis* disappears in this form of novation.

This distinction between an abstract and a concrete promise is of practical importance in determining a question upon which there is much diversity of opinion among Continental writers, namely: To what extent may A urge against C, suing on the new obligation, defences which were open to A against B, or to B against C, on the old and extinguished obligations?

This question may be best answered by considering separately the typical cases of novation.

(1 *a.*) A promises C to pay him what A owes B, for C's promise to release B, or, in case B has assigned to C his claim against A,

¹ Illustrations of a novation where two debts are extinguished may be found in *Fairlie v. Denton*, 8 B. & C. 395; *Cochrane v. Green*, 9 C. B. N. s. 448; *Barniger v. Warden*, 12 Cal. 311; *Lester v. Bowman*, 39 Iowa, 611; *Finan v. Babcock*, 58 Mich. 301; *Heaton v. Angier*, 7 N. H. 397; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 16 N. H. 580; *Cotterill v. Stevens*, 10 Wis. 422; *Cook v. Barrett*, 15 Wis. 596.

for C's promise not to enforce the assigned claim. If A had a defence against B, and so was not liable to him, by the very tenor of his promise he cannot be charged by C. If, on the other hand, A had no defence against B, but B had a defence against C, A must perform his promise. For A, having been released from his debt to B, has no answer to an action on his promise to C. C, however, because of the failure of consideration between him and B, must hold his promise as a constructive trustee for B.

(1 *b.*) A gives his note to C upon the understanding that B's claim against A, and C's claim against B, are to be extinguished. If, as before, A was not liable to B, he must nevertheless pay the note to C; for C confessedly has the legal title to the note, and having taking it in the course of business, holds it free from all equities in favor of A.¹ If, on the other hand, A had no defence against B, his promise to C is binding, although B had a defence against C. C, however, will be a constructive trustee of the note for B, as in the case of the bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.

(2 *a.*) A promises C to pay him what B owes C, for C's promise to release B. If B had a defence against C, and so was not liable to him, A by the terms of his promise is not liable to C. If, on the other hand, B had no defence against C, but A had a defence against B, A must pay C. For C having given up his claim against B for A's promise to him, must be entitled to enforce it free from any equities in favor of A.²

(2 *b.*) A gives his note to C upon the understanding that the debt of A to B, and of B to C, are to be cancelled. If, as before, B was not liable to C, A must nevertheless pay his note.³ C has the legal title to the note, and A, having obtained the release of his debt to B, has obviously no equitable defence. C, however, although he has the legal title to the note, must hold it, or its proceeds when collected, in trust for B; for the consideration having failed as between him and B, he would be unjustly enriching himself at B's expense if he were allowed to retain the note for his own benefit. If, on the other hand, B had no defence against C, but A had a defence against B, A must pay C as in the case of the

¹ See *Eastern Co. v. Benedict*, 15 Gray, 289.

² *Edenfield v. Canady*, 60 Ga. 456.

³ *Keller v. Beaty*, 80 Ga. 815; *Bearce v. Barstow*, 9 Mass. 44; *Adams v. Power*, 48 Miss. 450; *Abbott v. Johnson*, 47 Wis. 239.

bilateral contract under similar circumstances, and for the reasons given in the preceding paragraph.¹

Still another phase of novation has been the source of much controversy. If the debt of A to B, or that of B to C, was secured by a mortgage, or by the undertaking of a surety, will the benefit of the mortgage or the suretyship survive to C, after the extinguishment of the old debts and the creation of the new one of A to C, in the absence of a specific agreement to that effect? C, it is submitted, should have the benefit of the mortgage in all cases but one; he should also be allowed to charge the surety where there is a *novatio nominis*, but not where there is a *novatio debiti*.

If A's debt to B is secured by mortgage, and B assigns his claim to C without mention of the mortgage, C, it is everywhere agreed, is entitled in equity to the benefit of the security. A, not having paid the debt, cannot, of course, re-enter or call for a reconveyance; B, though holding the legal title of the mortgage, cannot hold it for himself, for he has transferred the claim to secure which it was given; the land mortgaged cannot remain locked up; equity, therefore, turns B into a constructive trustee for the person who in natural justice is best entitled to it, that is, C, the assignee of the claim. If C now undertakes not to enforce this assigned claim of B against A in consideration of A's direct promise to pay him, there is no reason why the constructive trust in favor of C should not continue. It is still true that A has not performed the condition entitling him to re-enter or call for a reconveyance. Although he cannot be sued upon the old debt, he has not *paid* it.

The result is the same, and for similar reasons, when without any assignment A promises to pay C what he owes B, in return for C's promise to release B, and at the same time makes a similar promise to B for B's promise to release A. As before, A is no longer liable on his old debt to B, but he has not *paid* that debt. A, therefore, cannot recover the legal title from B, nor can B keep it for himself, having no longer the claim against A. He must, therefore, in justice hold the mortgage for C, who has, in effect, succeeded to B's claim against A.

If, again, the debt of B to C was secured by a mortgage, and A promises to pay C that debt, for C's promise not to sue B, C's right

¹ Dever v. Atkin, 40 Ga. 423; Gresham v. Morrow, 40 Ga. 487; Morris v. Whitmore, 27 Ind. 418.

to the mortgage is still clearer.¹ B, though no longer liable to an action on the old debt to C, has not performed the condition of the mortgage by *payment*. C is as much entitled to retain the mortgage as a mortgagee who cannot sue the mortgagor because the debt is barred by the Statute of Limitations.

But if, on the other hand, the debt of A to B was secured by mortgage, and A promises to pay C, not that debt, but the unsecured debt of B to C, the mortgage will not survive the novation. B, as before, having no right to sue A, cannot keep the mortgage for his own benefit. Nor is there any ground for making B a constructive trustee for C. For in this case it is not C who succeeds to B's secured claim against A, but A who succeeds to B's unsecured duty to C. Since, then, neither B nor C is entitled to the mortgage, equity should treat it as extinguished.

If, finally, X was a surety for A to B, the substitution of A's liability to C for his former liability to B (*novatio nominis*) ought not to affect the liability of X. A's liability continues in substance the same as before, and X is in no way prejudiced by a change of creditors. The case is, in effect, the same as if B had assigned his claim against A to C. C would thus become *dominus* of the claim against A, and no one would assert that in such a case X would be discharged.²

But if X was a surety for B to C, and C agrees to discharge B in consideration of A's promise to pay B's debt to C (*novatio debiti*), X, the surety, is also released; for it would be an utter perversion of X's contract to hold him as surety for A when he in fact became surety for B alone.

F. B. Ames.

¹ *Foster v. Paine*, 63 Iowa, 85; see also 74 Wis. 456. It is by the same principle that a change in the form of a debt secured by mortgage does not affect the mortgagee's right to the security. 1 *Jones, Mortgages* (4th ed.) § 924.

² *Black v. De Camp*, 78 Iowa, 718.

THE CRITICISM OF CASES.

PROFESSOR JOHN C. GRAY, in his book on "Perpetuities," says, "The prevention of property from inalienability is simply an incident of the rule against perpetuities, not its object. The true object of the rule is to restrain the creation of future conditional interests."¹

This is a bold statement. The following quotations will show the object of the rule as it lay in the minds of the judges who made it, and of those who have since applied it.

Lord Chancellor Nottingham, in 1681: "A perpetuity is the settlement of an estate or an interest in tail with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment. But such remainders must continue as perpetual clogs upon the estate."²

Lord Keeper Guildford, in 1683: "If in equity you should come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth."³

Powell, J., in 1698: "But they were not for going one step further because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes; that is to say, an estate unalienable though all mankind join in the conveyance."⁴

Lord Talbot, in 1736: "However unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet . . . considering that the power of alienation will not be restrained longer than the law would restrain it (viz., during the infancy of the first taker), which cannot reasonably be said to extend to a perpetuity," etc.⁵

Lord Eldon, in 1805: "The question always is whether there is a rule of law fixing the period during which property may be unalienable."⁶

¹ Gray on Perpetuities, § 600.

² Norfolk's Case, 3 Ch. Cas. 1, 31.

³ Norfolk v. Howard, 1 Ver. 163.

⁴ Scatterwood v. Edge, 1 Salkeld, 229.

⁵ Stephens v. Stephens, Temp. Talb. 228, 232.

⁶ Thelusson v. Woodford, 11 Ves. 146.

Lord Chancellor Cottenham, in 1849: "These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods."¹

Kay, J., in 1889: "The truth is that under the old feudal law existing in England, which is only being broken down slowly by legislation and decisions of the court, and which still exists to a very great extent, there has been a constant attempt on the part of owners of land to limit it in the most elaborate fashion, in order to tie it up as long as possible, and that constant attempt has been constantly defeated both by legislation and the decisions of courts of law."²

Shaw, C. J., in 1853: "A man cannot, under this general *jus disponendi*, thus tie up property in perpetuity and make it inalienable in his own posterity. It is a legal impossibility."³

Gray, J., in 1865: "The reason of the rule is, that to allow a contingent estate to vest at a more remote period would tend to create a perpetuity by making the estate inalienable."⁴

These quotations might be multiplied. It is enough, however, to say that there seems never to have been any doubt in the minds of judges that the rule against perpetuities is properly so named, and that the restraint upon the creation of future conditional interests is not the object of the rule, but simply the means by which that object is effected.

It is true that in his chapter entitled "Interests though alienable may be too remote," Professor Gray shows that the rule applies to some cases where, by the co-operation of those holding the present interest and the remote interest, the property may be alienated. In other words, the reason for the rule is not quite co-extensive with its application. But are there not many such misfits in the law? This fact alone seems hardly a sufficient ground for discarding the accepted reason, and framing a new one, as in section 269: "It is not the inalienability of an interest dependent upon a remote contingency, but its utterly uncertain value, which furnishes the sufficient justification, if it was not the original ground of the rule against perpetuities."

Professor Gray proceeds to attack at some length Christ's Hospital

¹ Christ's Hospital v. Grainger, 1 McN. & G. 460.

² Whitby v. Mitchell, L. R. 42 Ch. D. 494, 500 (1889).

³ Blake v. Dexter, 12 Cush. 559, 570.

⁴ Odell v. Odell, 10 Allen, 1, 5.

*v. Grainger*¹ and *Jones v. Habersham*;² and the force of his criticism rests upon the assumption that the true object of the rule against perpetuities is not what the judges have always supposed it to be. Those cases hold that a limitation over to one charity after a gift to another charity is not a violation of the rule against perpetuities, because that rule does not apply to charities.

If the true object of the rule is to prevent the tying up of property, it follows that the right to tie up property in favor of one charity is simply an exception to the rule; and the courts, in holding that property may as well be tied up in favor of two successive charities as of one, stand upon firm ground. If, however, the true object of the rule is to prevent the creation of remote interests, then Professor Gray may be right in supposing that the courts have blundered into a violation of the rule.

Mr. Justice Holmes in two lectures upon Agency, delivered while he was professor in the Harvard Law School, and reprinted last year in this REVIEW,³ has pointed out what seem to him anomalies in the law of agency; and the principal of these is the law making the master responsible for the torts of his servant done in the course of his business, though against his commands.

In his view this doctrine is not to be explained upon any rational principle. He has therefore sought an historical explanation for it in the *patria potestas* of the Roman law. The absolute power of the head of the family over his children and his slaves, and his responsibility for their conduct to the outside world, gave rise to the notion of identity between the head and its various members. The phrase expressing this identity, being retained as a working formula after the relation which gave rise to it had ceased to exist, has led to that enlarged responsibility of the master for his servants to which the courts of common law now stand committed.

The lecturer admits, with characteristic candor, that the Roman law "developed no such universal doctrines of agency as have been worked out in England," and that "it was not generally possible to acquire rights or to incur obligations through the acts of free persons" (p. 350); and that even in Bracton, who wrote "under the full influence of the Roman law," he can find no "passage which distinctly asserts the civil liability of masters for their servants'

¹ 1 McN. & G. 460.

² Harvard Law Review, iv. 335; v. 1.

³ 107 U. S. 174.

torts apart from command or ratification" (p. 355). It is to be noticed further that the absolute liability of the master for the torts of his slave, which sprang from the ancient obligation to surrender the noxious thing, was the same whether the slave was on his master's business, or on his own private business of murder and rapine. The doctrines of the Roman law, therefore, would have to be both cut down and pieced out before they could be made to resemble the common-law "anomaly" in question. The lecturer admits also that it is not necessary to go back to the Twelve Tables to account for the notion of identity so far as it is involved in the maxim *Qui facit per alium, facit per se*, but that any modern judge might have invented such a rule. It is only the responsibility of the principal for acts which he does not authorize which calls for some occult explanation; and this part of the law is confessedly of modern growth.

The obvious objection to the theory advanced is that it appears not to be supported by the judges who made the law.

The naturalist cannot ask the frog how he came to be a frog. He is therefore compelled to rest his theories of evolution upon a minute examination of fossils. But when we inquire how a particular judge came to decide a particular case in a particular way, it is always prudent to see first of all what explanation the judge himself has to offer. And when his opinion is tolerably full and tolerably clear, it is not altogether safe to assume that any process of unconscious celebration has had much to do with the result.

An examination of the cases seems to justify the conclusion that the English judges have not used the "formula" or "fiction" that principal and agent are one heedlessly, or without due regard to its proper limits. On the contrary, their judgments seem to have been founded upon considerations of practical convenience and hard-headed common-sense.

There is space to refer only to the decisions of Lord Holt, which, as Judge Holmes says, "furnish the usual starting-point of modern decisions."

In *Turberville v. Stampe*,¹ Lord Holt says: "So in this case, if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master shall be liable to an action for damage

¹ *Ld. Raymond*, 264.

done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit."

In *Hern v. Nichols*,¹ "Holt, C. J., was of the opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

In *Lane v. Cotton*,² an action against the postmaster-general for the loss of certain exchequer bills which had been delivered at the post-office, Lord Holt said: "What is done by the deputy is done by the principal, and it is the act of the principal, who may displace him at pleasure, even although he were constituted for life." And again, "It is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it."

I find no evidence in these opinions that Lord Holt was carried away by the use of formulas whose application he did not understand. Nor can I assent to the view that this enlarged responsibility of the principal is so irrational as to be accounted for only by some illogical working of the judicial mind. The most careful person will sometimes be careless, and for those careless acts the law holds him responsible. The most carefully selected servant engaged in his master's business will sometimes be careless. Upon what ground should the person for whose benefit the business is carried on be held to a greater degree of liability in the one case than in the other? It can readily be seen that if any other rule had been established, there would be an enormous inducement to every man carrying on a business in which accidents were likely to happen, and damage was likely to be done, to get himself incorporated, and have his work done by agents for whose torts he need not answer.

I have taken here two instances of legal criticism, by writers of the highest authority, for the purpose of giving point to the question whether any limit may properly be set to the criticism of cases.

Professor Gray suggests a new reason for an old rule, and upon the strength of that suggestion attacks a decision which is plainly sound, if the reason which has been given by the judges for two hundred years is sound.

¹ 1 Salk. 289.

² 1 Salk. 17, 18.

Judge Holmes suggests a remote historical explanation for a well-established rule which he declares to be an absurdity and an anomaly. But the judges by whom that rule has been enunciated and applied, the most eminent of their time, have been quite unconscious of the historical influence, and have never recognized the absurdity.

Neither of these writers would wish to be called a law reformer, meaning by law reformer a person who is ambitious to write a code. They aim, not at the improvement of the law by legislation, but rather at such improvement in its study and in its administration as shall render its principles more intelligible, and its application more certain.

How far do these speculations tend to clear up the knotty points of the law? Are we to take nothing for granted? Are we to argue every question *de novo*, as if the decisions of the last two hundred years had settled nothing? Are we to reconstruct our precedents by declaring that the grounds upon which the decisions are made to rest are not the true grounds?

The criticism of a case because it is opposed to another case, or to a principle which has been established and defined by a line of cases,—all this we understand. But to criticise a case because it is opposed to a principle which the writer would be glad to see recognized, as more rational or as offering a fairer ground for the decided cases to rest upon than any which the courts have seen fit to adopt,—what is this but a beating of the air? How does such criticism help us to a sound judgment of cases and a correct application of principles?

Jabez Fox.

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PHILIP WARDNER.

A MASSACHUSETTS ACT MAKING THE RECORD OF INSTRUMENTS AFFECTING THE TITLE TO LAND CONCLUSIVE EVIDENCE OF DELIVERY.—One of the provisions in the Acts and Resolves of Massachusetts for 1892 is a long step in the right direction. The Act reads: "The record of a deed, lease, power of attorney, or other instrument duly acknowledged or proved in the manner provided by law, and purporting to affect the title to land, shall be conclusive evidence of the delivery of such instrument, in favor of purchasers for value without notice, claiming thereunder." It would seem in the line of reason and convenience for the Legislature to go further, leave out the restriction to purchasers for value, and so reverse the law as laid down in the leading Massachusetts case of *Maynard v. Maynard*, 10 Mass. 456. A man should be prevented from denying that a document which he has recorded is a deed, even where it is a pure gift, as in *Maynard v. Maynard*. If it is a mere private memorandum, it has no business on the public records. Still, much the most important thing is to protect innocent purchasers; and the new Massachusetts statute sets a good example to the other States, in most of which the registration of a deed is merely *prima facie* evidence, and the presumption may be rebutted even as against purchasers for value without notice.

BUILDERS' CONTRACTS WITH ARCHITECTS' CERTIFICATE; THE TRUE GROUND OF THEIR DECISION.—The rule so readily accepted by the Washington Supreme Court, *Craig et al. v. Geddis*, 30 Pac. Rep. 396, in regard to builders' contracts and the necessity of producing the architects' certificate required by the contract, had better be put on the true ground,—hardship. The defendant's promise to pay was conditioned expressly on a certificate being produced from the architect that the work had been done satisfactorily. The plaintiff attempts to recover without so producing. And the court ruled, in substance, that where there has been substantial compliance with all the terms of the contract, and nothing remains to be done which is practicable and reasonable to require, there is no need of producing the certificate.

Two well-settled rules of express conditions are, —

Express conditions must be performed, not alone in spirit, but in letter.

But prevention by the defendant of performance of the condition will excuse non-performance.

A descending scale of prevention of performance of this particular condition might be thus written: (1) prevention directly by the defendant, or indirectly by his collusion with the architect; (2) prevention by fraud on the part of the architect; and (3) prevention by the unwillingness or unreasonableness of the architect. But of these three, only (1) has the quality of prevention laid in the above rule; namely, prevention by the defendant. Authority and principle agree that (1) excuses non-performance; but on (2) and (3) they part company, (2) being the more conservative rule adopted in this country, *Chinn v. Schipper*, 51 N. J. Law, 1, and (3) the more general rule, *Nolan et al. v. Whitney*, 88 N. Y. 648; *Bentley v. Davidson*, 43 N. W. Rep. 139.

Often the proposition is confounded with the rule of implied conditions, that after part performance the breach must go to the essence. So in builders' contracts the question is put, as in the principal case: Has there been substantial compliance? But when this is done, the real nature of an express condition is lost sight of. An express condition is one mutually agreed by the parties to be binding; and when there is a contract already expressly made by the parties, the court must not find another in its stead.

After all is said, the facts remain that the condition is a very common one and a very hard one. Either the condition had to be changed by the builders, or its interpretation by the courts. And the change has been made by the courts rather than by the building fraternity.

THE LIABILITY OF MUNICIPAL CORPORATIONS AS CONSTRUCTIVE TRUSTEES. — The opinion of the Supreme Court of Pennsylvania in the Franklin Will Case (*In re Franklin's Estate*, 24 Atl. Rep. 626) is in more ways than one a disappointment. The subject is surely of importance to justify an opinion of average clearness and care; but the court succeeds in keeping two possible grounds for its decision vaguely shadowed forth so impartially that it is impossible to pick out either point as absolutely decided. To add to the flimsiness of their opinion, they refrain from quoting authorities on either point.

Benjamin Franklin left £1000 to the city of Philadelphia, to hold in trust, to lend at interest for one hundred years, at the end of which time part was to be appropriated to municipal objects, and the rest accumulated another century, to be divided finally between the city of Philadelphia and the State of Pennsylvania. The present appellant from the Orphans' Court, where the petition for an account was brought, claim that the trusts are void, and that they are entitled as representatives of the next of kin and the claimants under Franklin's residuary legatees.

The court grants for the present purpose that the trust for accumulation was illegal, and the bequest for that reason void. "It does not, however," they say, "necessarily follow that the fund was impressed, in the hands of the city, with a trust in favor of the residuary legatees or the legal representatives of the testator, or that the city, in virtue of its acceptance of it, became a trustee for the appellants, and, as such, liable

to account to them in the Orphans' Court." The last part of this sentence suggests the possibility that the court only wishes to say that the Orphans' Court has jurisdiction of express trusts only, and that therefore this case belongs to the Court of Common Pleas. If so, their expressions are most unfortunate; and it really seems impossible to escape the belief that they intend to say that a municipal corporation is not liable as constructive trustee when an express trust fails, so that an individual would be liable. A corporation, they say, being the creature of law, "can have only those capacities which are imparted, and exercise only those powers which are expressly, or by necessary implication granted to it. . . . In the absence, therefore, of an express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a nonentity." This last point is the only one on which they quote authorities, — one a dictum from Judge Sherwood, who is speaking of express trusts, and says that a municipal corporation cannot administer them for purely private purposes; the other, *Mayor v. Elliott*, 3 Rawle, 170, where nothing is said on the subject, and the decision is that certain trusts were good, as among the objects for which the corporation existed.

After supporting a point not in issue by this brilliant array of authorities, the court quickly assumes that a city can be constructive trustee in no case where it could not be express trustee. "Where a trust is implied contrary to intention, as would be the case here, the implication is a fiction of the law inserted to prevent a failure of justice. But the law will not resort to a fiction that will defeat its own policy by converting into a trustee a municipal corporation from which it has, for the public good, withheld capacity to accept and administer the trust."

Why this reasoning would not apply to an individual trustee, they do not state. It would be superfluous to quote authorities to show that the decision is as bad law as it is bad sense. Several cases are collected in *Chapman v. Co. of Douglas*, 107 U. S. 348. A good statement of the law is this from Chief Justice Field, in *Pimentel v. City of San Francisco*, 21 Cal. 362: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, from the general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. The legal liability springs from the moral duty to make restitution."

WAGERING CONTRACT: A QUESTION OF DEFINITION. — In *Carlill v. Carbolic Smoke Ball Co.* (1892), 2 Q. B. 484, Hawkins, J., gives us a definition of wagering contract. In view of the prominence of contracts in "futures," and the unsatisfactory grounds of their decisions, some analysis of this definition may be of service. The question was raised on curious facts. The Smoke Ball Co., by public notice, offered £100 to whomsoever contracted the increasing epidemic influenza colds after using their carbolic smoke ball daily for two weeks. The plaintiff did so use the smoke ball, and contracted the cold; and the defendant now contends that it is a wagering contract, as the liability depended on events beyond control of the parties.

Hawkins, J., deciding that it was not a wagering contract, put forward the following definition: "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of the event, one shall win from the other, and the other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract, that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore remaining uncertain until that issue is known. If either of the parties may win, but cannot lose, or may lose but cannot win, it is not a wagering contract. It is also essential that there should be mutuality in the contract."

This seems to reduce to the following essentials:—

1. A mutual agreement of two that, according to the issue of a future uncertain event, one shall receive from the other a stake.
2. The necessity that each party may win or lose.
3. That neither party shall have any interest other than the stake he is to win or lose.
4. Mutuality of intent so to hazard.

Query might well be made whether the uncertain event must be future; elaboration is needed of the term "stake;" and emphasis ought to be laid on the fourth requisite. But it is the third that requires attention.

Let it be tested by applying the definition to contracts of insurance. Now policies of insurance taken out by those who have no interest in the insured property or life are unenforceable, as being wagering contracts (*Howard v. Albany Ins. Co.*, 3 Denio, 301; *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457); while policies taken out by those having a proper interest are binding. The necessary elements of contract are present in both classes; the difference only in the point of interest. They are both the same in their nature,—wagers: but for reasons of public policy one class is allowed, and the other not allowed.

Under the above third term, however, one will be termed a wagering contract, and the other not.

True, it makes no practical difference in the rule of law of to-day whether we say all unenforceable contracts of hazard are wagering contracts, and contracts of hazard in which the party has a proper interest are not unenforceable, or whether we say all contracts of hazard in which the party has no proper interest are unenforceable. But as a matter of accuracy and proper terminology, the rule should be stated in the last form. And if in the future, public policy shall dictate that other contracts of hazard shall be added to the class of contracts of insurance, and be enforceable, then the rule will be in the proper shape; namely, that all are alike wagering contracts, but some wagering contracts the courts will enforce, while others they will not enforce.

The principal case might have been decided on grounds 2, 3, or 4. The decision went on ground 2.

This distinction is suggested in Anson on the Law of Contracts, p. 183; and the definition of Hawkins, J., may be reduced to Anson's definition by striking out term 3.

RECENT CASES.

ADMINISTRATOR DE BONIS NON — RETAINER BY REPRESENTATIVE OF DECEASED ADMINISTRATOR. — An administrator *de bonis non*, with the will annexed, died before the estate was settled, and the administrator of his estate took possession of certain bonds that had belonged to the original testator. The new administrator *de bonis non* on his appointment brought a suit in equity, under a statute supplementing replevin, for the delivery of these bonds. *Held*, that he could not recover *all* of them, for until the former administrator's account was settled in the probate court, his administrator had a right to hold part of the assets of the estate as security for whatever sums should be found due him. Field, C. J., and Knowlton and Barker, JJ., dissent. *Foster v. Bailey*, 31 N. E. Rep. 771 (Mass.).

The decision of the court is based on the idea that although the second administrator *de bonis non* took title to these chattels, still it was subject to all existing liens and incumbrances, and that the right of the first administrator to retain goods to reimburse himself for expenditures attached, like a lien, and prevented the second administrator from taking a clear title.

It is submitted that this decision is virtually a piece of judicial legislation. An executor or administrator gets the full title to chattels subject to a legal duty of disposing of them for the benefit of the legatees or next of kin. The exercise of the right of retainer serves merely to divest the chattels of this interest of the legatees or next of kin, and thus makes the executor's or administrator's title absolute; and an election to retain any specific goods is an administration of them. The court does not deny that these bonds were unadministered, but holds that the right of retainer, which was not exercised by the first administrator, could be made use of by his representative. But on the death of the first administrator the title in these unadministered chattels at once vested in the new administrator *de bonis non*, and any attempt by the representative of the first administrator to dispose of them would have been a conversion. Moreover, since the title was elsewhere, he could not by mere act of his own put absolute ownership in himself; the greatest possible right he could have would be to retain possession as on a bailment. Under this decision, if the probate court found that the estate was indebted to him, he could not sell these chattels as his own and keep the proceeds; at most, he could hold them as a pledge of payment by the new administrator *de bonis non*. This is not a right ever possessed by the former administrator, but a substitute for his rights, invented by the court.

AGENCY — AGENT FOR BOTH PARTIES — FIRE INSURANCE. — Plaintiff applied to B, insurance agent for several companies, for a specified amount of insurance on two docks of lumber. He did not mention the particular companies or the rate. B said he would issue policies at once; he signed but did not deliver them for several days. Meantime the lumber was burned. The policies aggregated a smaller sum than that applied for. *Held*, that there was a valid contract with each company in which a policy was issued, as the agent acted for plaintiff in choosing the companies and distributing the risk. Grant, J., dissented, on the ground that there was no meeting of minds. *Mich. Pipe Co. v. Mich. Fire etc. Ins. Co.*, 52 N. W. Rep. 1070 (Mich.).

AGENCY — NEGLIGENCE OF VICE-PRINCIPAL. — The foreman of an extra gang of track-repairers, whose sole duty it is to supervise the work of track-repairing over eighteen or twenty miles of the road-bed of a railroad company, to hire the men necessary to do that work, and to direct the operations of the force so employed, is a vice-principal for whose negligence the railroad company is liable when a workman in said gang was injured while under his orders. *Northern Pac. R. Co. v. Peterson*, 51 Fed. Rep. 182 (Minn.), C. Ct. of Appeal.

This case shows the tendency of the American courts to adopt the vice-principal doctrine, and thus to interpret the harsh rule of common employment more liberally in the workman's favor.

Railway Co. v. Ross, 112 U. S. 377, is cited. Thayer, J., concludes from that case that the test for determining whether a person occupies the relation of a vice-principal or a fellow servant "is not whether the person has charge of an important department of the master's service, but whether his duties are exclusively those of supervision, direction, and control over a work undertaken by the master, and over subordinate employees engaged in such work, whose duty it is to obey, and whether he has been vested by the common master with such employment of supervision and management."

BILLS AND NOTES — BONA FIDE HOLDER. — Defendant gave to M her signature on a blank paper to enable M to draw an order upon a bank for purposes of defendant's business. M fraudulently wrote over the signature a promissory note to himself as payee. Plaintiff indorsed the note for M's accommodation, and at maturity had to take it up. Plaintiff was ignorant of M's fraud. *Held*, that plaintiff could enforce the note. *Breckenridge v. Lewis*, 24 Atl. Rep. 864 (Me.).

The court says that defendant gave to M apparent authority to use her signature as he did, and that as she made the fraud possible, the loss should fall on her rather than on an innocent third party. This decision follows the distinction taken in *1 Daniell, Negot. Instruments*, § 843 and § 845, between the case where an agent is entrusted with his principal's blank signature for a certain purpose, in which case the principal is liable to innocent third persons if the agent abuses his trust, and the case where a party gives his signature without intent to have it used for business purposes, when he is not liable if a note is drawn above it. The real question in these cases should be whether the defendant's conduct has been negligent when measured by the standard of care of the ordinary business man. If he has been negligent, it is submitted that he should be held, no matter whether he wrote his name for a business purpose or not.

CARRIERS — NEGLIGENCE — ACT OF GOD. — A common carrier neglected to give notice of the arrival of certain goods which, therefore, remained in the warehouse and were injured by an extraordinary freshet. *Held*, that the carrier had been guilty of negligence, and could not set up the act of God as an excuse. *Richmond R. R. v. White*, 15 S. E. Rep. 802 (Ga.).

This is in accord with the doctrine laid down in *Michaels v. R. R.*, 30 N. Y. 564, which has been followed in Missouri and Illinois. The opposite view was held in *Morrison v. Davis*, 20 Pa. St. 171, and accepted in the United States Supreme Court and in Massachusetts, Ohio, and Michigan.

CONSTITUTIONAL LAW — POWERS OF CONSTITUTIONAL CONVENTION — SUBMISSION OF NEW CONSTITUTION. — Where the Legislature convokes a convention for the purpose of framing a new constitution, without requiring that, when adopted, it shall be ratified by popular vote, it is not necessary to the validity of the constitution that it be so ratified. *Sproule v. Fredericks*, 11 So. Rep. 472 (Miss.).

It would seem that the decision is sound so far as this is a question for the courts. If the Act convoking the convention should provide for submission of the constitution to the people, in such case the courts could declare the constitution not to be in force until ratified. *Wells v. Bain*, 75 Penn. St. 39; *Wood's Appeal*, 75 Penn. St. 59. Mr. Jameson in his book on "Constitutional Conventions" (§ 481) says that even where the Act is silent, the constitution should be submitted. But whether he is right on this point or not, the question would seem to be one of politics, and outside the province of a judicial tribunal. The court in this case go to the extreme limit in asserting sovereign powers for a constitutional convention, calling it "a constitution-making body." For the opposite view, see Jameson, c. vi. The statements of the courts as to precedents in Mississippi are hardly true historically. The first constitution, in 1817, and the second, in 1832, were submitted, as well as the reconstruction constitution of 1868. The secession amendments in 1861 were not submitted. The custom in Mississippi would seem to favor a submission to the people.

CONSTRUCTION OF STATUTE — CUSTOMS DUTIES — BOOKS. — The Tariff Act of 1890 provides that a book must have been "printed and bound more than twenty years," to be entitled to enter free of duty. *Held*, that a set of books printed and bound more than twenty years, but rebound within that period, was nevertheless entitled to free entry, on the ground either that, having once been bound twenty years ago, the statute was complied with, or else that rebinding was not the same as binding. *In re Boston Book Co.*, 50 Fed. Rep. 914 (Mass.), C. Ct.

CORPORATIONS — ILLEGAL EXPULSION OF MEMBER — ACTION FOR DAMAGES. — There can be no action for damages arising from illegal expulsion from membership in an incorporated mutual benefit society. The only remedy is by mandamus to compel reinstatement. *Lavalle v. Société St. Jean Baptiste de Woonsocket*, 24 Atl. Rep. 467 (R. I.).

It is not easy to follow the reasoning which leads the court to conclude that bringing an action for damages is an admission that the expulsion was legal. A contrary decision was reached in *Ludowski v. Society*, 29 Mo. App. 337, a case which seems better supported by reason and authority.

CORPORATIONS — LEASE OF FRANCHISE. — A railroad company in New Jersey leased its franchise and roads to a railway corporation of another State. The lease was expressly forbidden by law. Its effect was to combine coal producers and carriers, and partially to destroy competition in the production and sale of anthracite coal. *Held*,

that it was a corporate excess of power tending to monopoly and public injury. *Held* further, that such excess of power might be restrained in equity at the suit of the attorney general. *Stockton v. Central R. Co.*, 24 Atl. Rep. 964 (N. J.).

The court points out that there has been some conflict of authority as to whether an injunction will issue at the instance of the attorney general to restrain every excess of corporate power, or whether, before it issues, actual threatened injury must be shown. The argument which sustains the first class of cases is that "every excess of corporate power violates the contract with government, and thereby invades public and governmental rights." See *Thomas v. R. Co.*, 101 U. S. 71. The argument to support the other class of cases is that "a court of equity shall not move upon a mere legal intendment, but should be satisfied of a real, substantial public injury, which demands the writ of injunction in the due protection of the public." The latter cases are preferred by the New Jersey court on the ground that if there be no present emergency, the injunction may well be reserved until final hearing.

The following cases show the difference of opinion on the point, Green's Brice's Ultra Vires (2d ed.), 708; 21 Ch. Div. 752; L. R. 18 Eq. Cas. 172; 11 Ch. Div. 449; 1 Drew & S. 154 (s. c. 6 Jur. N. s. 1006); 35 Wis. 525.

CORPORATION, MUNICIPAL — POWER TO ACT AS TRUSTEE. — The acceptance by a municipal corporation of a legacy under a void bequest does not make the corporation a trustee for the residuary legatees as to the money so received, and the Orphans' Court has no jurisdiction to compel an accounting therefor. *In re Franklin's Estate*, 24 Atl. Rep. 626 (Pa.).

For further discussion, see page 202.

EQUITY — FRAUD — REFORMATION OF DEED. — Plaintiff agreed to sell land to defendants and prepared a deed. Defendants prepared another deed, covering the first and also a second parcel of land, which they prevailed on plaintiff to sign and acknowledge by falsely representing that this deed was the same as the first deed. Plaintiff prayed to have this deed reformed to exclude the second parcel of land. *Held*, that as plaintiff knew all about the land which he sold, and as defendants occupied no fiduciary position towards him, the court would give no relief. Plaintiff was negligent and must suffer the consequences. *Rushton v. Hallett*, 30 Pac. Rep. 1014 (Utah).

This case seems to go too far. Even if plaintiff was negligent it is submitted that the court should not, for that reason, allow defendants to gain any advantage from their fraud.

EQUITY — HUSBAND AND WIFE — ALIMONY WITHOUT DIVORCE. — It is within the general jurisdiction of a court of equity to issue a decree for alimony at the suit of a deserted wife, although plaintiff does not apply for a divorce, and although a court of equity would have no jurisdiction to grant such an application if made. *Edgerton v. Edgerton*, 29 Pac. Rep. 966 (Mont.).

The rule laid down in this exhaustive judgment, though enforced by Statute in New Jersey and Illinois, and adopted by the courts in Iowa, Colorado, California, and a number of Southern States, is opposed on the whole to the weight of authority, including England, New York, and Massachusetts. See Bishop on Marriage, Divorce, and Separation, §§ 1393-1400 (1891).

EQUITY — INJUNCTION — LABOR UNIONS — INTERFERENCE WITH EMPLOYER. — An injunction may be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats, or intimidation preventing complainant's employees from working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent. *Cœur d'Alene Consolidated & Mining Co. v. Miners' Union of Wardner et al.*, 51 Fed. Rep. 260 (Idaho), C. Ct.

INSURANCE — RE-INSURANCE — LIABILITY OF RE-INSURING COMPANY. — *Held*, that where company A insures in company B, the liability of company B to company A is to be measured by the actual damage to the insured property and A's liability for the same, and not by what A actually pays in liquidation of that liability. *Held*, therefore, that where both company A and company B had become insolvent, the payment of a dividend on the claim of the insured against company A was not a condition precedent of a proof by the latter of their claim against company B, nor the measure of the amount of such proof. *In re Eddystone Marine Ins. Co.*; *Ex parte Western Ins. Co.* [1892] 2 Ch. 423 (Eng.).

INTERSTATE COMMERCE — "EQUAL FACILITIES" — PLEADING. — Section 3 of the Interstate Commerce Act provides that every common carrier shall provide equal facilities for the interchange of traffic with connecting lines, and that there shall be no

discrimination in charges between such lines. Complainant in a petition to the commission charged that the respondent did not afford it equal facilities, and in support of the charge averred that there had been a discrimination of rates and the withdrawal of a through tariff. *Held*, that both provisions of the statute were drawn in question by the petition and that the commission might properly make an order against the respondents' not discriminating in charges, as well as against their not affording equal facilities. *New York & N. Ry. Co. v. New York & N. E. Ry. Co.*, 50 Fed. Rep. 867 (N. Y.) C. Ct.

INTERSTATE COMMERCE — ORIGINAL PACKAGES — BREAKING OF PACKAGE. — Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package, as will destroy its original character. *In re McAllister*, 51 Fed. Rep. 282 (Md.), C. Ct.

LANDLORD AND TENANT — OBSTRUCTION BY LANDLORD — EVICTION. — The lessor of a city lot erected a building on adjoining lot and deposited building material during three months on a cross-walk leading from in front of the leased premises to the opposite side of the street. *Held*, that the obstruction was an eviction of the defendant from a part of the leased premises, and the defendant, though he did not surrender possession, need not pay rent. *Edimison et al. v. Lowry*, 52 N. W. Rep. 583 (S. Dak.).

MASTER AND SERVANT — CONFIDENTIAL RELATION BETWEEN EMPLOYER AND EMPLOYEE — INJUNCTION. — Defendant was first an apprentice and then a paid clerk of the plaintiffs, a firm of engine makers. Two days before leaving the plaintiffs' employ, defendant compiled a table of dimensions of the various types of engines made by the plaintiffs, which dimensions the plaintiffs claimed to be trade secrets.

Held, that there was no obligation on the part of the plaintiffs to give the defendant, who occupied at the time simply the position of a clerk, this information, but that, on the contrary, there was a confidence arising out of the mere fact of the defendant's employment, "the confidence being shortly this, that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information," which made it unlawful for the defendant to take advantage of his position to compile these tables for his own personal ends. Hence an *ad interim* injunction was granted as asked for, restraining the defendant from publishing or communicating the table or its contents to any person. *Merryweather v. Moors*, [1892] 2 Ch. 518 (Eng.).

MUNICIPAL CORPORATIONS — POWER TO TAX. — Art. 10, § 3, of State constitution provides that "all taxes shall be uniform," and that they shall be levied and collected "under such regulations as shall secure a just valuation of all property, real and personal." The city charter contained the power to tax street-cars by license to pay for cost of police supervision. *Held*, that the city could not tax the cars under the license, for purpose of municipal revenue. *Denver, etc. Ry. Co. v. City of Denver*, 30 Pac. Rep. 1048 (Col.).

NEGLIGENCE — LIABILITY FOR ESCAPE OF FIRE. — Plaintiff alleged that defendants negligently set fire to grass on their prairie-land and allowed the fire to escape, and that the plaintiff, to protect his property, set a back-fire, which, without his fault and because he was driven off by the heat from defendants' fire, escaped, and destroyed his property, which would have been destroyed by defendants' fire. *Held*, on demurrer, that plaintiff could recover. *McKenna v. Buessler*, 53 N. W. Rep. 103 (Iowa).

PARTNERSHIP, RIGHTS OF, TO INVENTION BY PARTNER. — By the articles of a co-partnership for manufacturing, the partners agreed not to "exercise or follow the said trade, or any other, to their private benefit," but to use their best endeavors for their mutual advantage, and stipulated that the partnership property should go to the surviving partner. Part of the partnership property consisted of machinery to which improvements, invented by the partners, had from time to time been added, each partner having contributed some feature. *Held*, that on the death of one partner before letters patent were obtained, the invention passed to the survivor as partnership property, and not to the representative of the deceased partner. *Blood v. Ludlow Carbon Black Co.*, 24 Atl. Rep. 348 (Pa.).

REAL PROPERTY — ACCRETIONS — APPROPRIATION OF AN AEROLITE BY FINDER. — An aërolite weighing sixty-six pounds, which fell from the heavens and was found three feet below the surface of plaintiff's land, and dug up by a stranger, belongs to the owner of the land, as do other accretions and deposits from natural causes. As it was never lost or abandoned, *held* that the rules as to finders of lost goods did not apply. *Goodard v. Winchell*, 52 N. W. Rep. 1124 (Iowa).

REAL PROPERTY — CONDITION IN RESTRAINT OF MARRIAGE. — A testator devised his homestead to an unmarried daughter, "for and during her natural life, unless she

should be married, in which case her life estate shall cease." *Held*, that the daughter's right to the homestead given by the will ceased upon her marriage. The intention of the testator, gathered from the whole instrument, was not to promote celibacy, but to give the daughter the homestead until, by her marriage, another home should be provided. *Mann v. Jackson*, 24 Atl. Rep. 886 (Me.).

The early English rule against devises of real estate with conditions subsequent intended to operate in restraint of marriage was borrowed by the English ecclesiastical courts from the Roman civil law. The courts of equity, desiring to follow the plain intention of the testator, and yet unwilling to depart from the decision of the ecclesiastical courts, were led into a multitude of confusing distinctions as to whether the bequest amounted to a condition or only to a limitation. No general principle of classification can be found in the hundreds of conflicting cases, and courts have of late attempted to fall back upon the reason and good sense of the question. *Mann v. Jackson* will be welcomed as a step forward out of the difficulty. See 2 Redf. Wills * 290, § 20, and note; *Id.* 297; 2 Jarm. Wills, 569; *Stackpole v. Beaumont*, 3 Ves. 98, and the cases cited in *Mann v. Jackson*.

REAL PROPERTY — CONSTRUCTION OF DEED — BOUNDARY ON FRESH WATER LAKE. — In construing a deed purporting to pass land bounded "along" a fresh water lake covering forty-five acres: *Held*, (1) that under the common law of New York the soil under the pond belonged to the riparian proprietors; (2) that unless the contrary appeared, a deed of land adjoining would be presumed to convey the soil as far as the centre of the pond; (3) that the use of the word "along" was not sufficient evidence of such contrary intention. *Gouverneur v. Nat. Ice Co.*, 31 N. E. Rep. 865 (N. Y.).

On the first point, the court disapprove of the dictum in 54 N. Y. 377, and follow 92 N. Y. 463, which appears on the whole to represent the modern tendency. See 140 U. S. 371. But this tendency is comparatively recent, and the greater number of jurisdictions are still probably adverse. See Angell on Watercourses, § 41, *seq.*; 12 Am. and Eng. Enc. of Law, 615, 642. On the second and third points, the Court assimilate the rule for ponds, in all respects, to that for running streams. *Sed quare*. There may be a certain argument, in the case of a stream, in favor of substituting for the boundary expressed, another line roughly parallel to it and not far distant. But it is going beyond the limits of possible construction to say that the expression "from point A three chains due south along the pond to point B," means the same as this: "From point A $\frac{1}{4}$ mile E. S. E. to the centre of the pond, thence $\frac{1}{4}$ mile W. S. W. to point B."

REAL PROPERTY — RULE IN SHELLEY'S CASE. — Lands were limited "to the use of E. and his assigns during his life without impeachment of waste," with an ultimate limitation to the use "of such person or persons as at the decease of the said E. shall be his heir or heirs at law, and of the heirs and assigns of such person or persons." *Held* (reversing the decision of Kekewich, J.), that the rule in *Shelley's Case* did not apply, but that the case came under *Archer's Case*, and that E. took, not an estate in fee simple, but merely a life estate with a contingent remainder over. *Evans v. Evans*, [1892] 2 Ch. 173.

Archer's Case (1 Co. 66 b) must be regarded as a well-recognized exception to the rule in *Shelley's Case* (see discussion of *Shelley's Case* in 1 Hayes, Conv. 5th ed. 542-546). *Quare* whether any extension of the exception in *Archer's Case* will not lead to great confusion, and whether in jurisdictions where the rule in *Shelley's Case* is maintained at all, the exception in *Archer's Case* should not be confined to the exact words of that case.

REAL PROPERTY — STREET IMPROVEMENTS — ASSESSMENTS. — A city charter empowered the city to make street improvements, "provided the city council shall pay one third, and the owners of the property two-thirds, the cost thereof." A certain street having been paved, it is sought to enforce a lien for two-thirds the cost thereof, upon the abutting property; or, if that could not be done, to enforce a claim *in personam* against the owners of such property.

Held, 1. That no lien could be enforced in absence of provision in the statute. 2. That there was no personal obligation, as the charter failed to mention what persons should be charged, or to prescribe any rule by which they could be ascertained. *City of El Paso v. Mundy*, 20 S. W. Rep. 146 (Texas).

TORT — MALICIOUS INJURY — DAMAGE. — Defendant falsely published in his paper that plaintiff had gone out of business, and in consequence thereof there was a considerable falling off in plaintiff's business. *Held*, that no action of libel would lie against the defendant, as the words were not defamatory, but that this action could be supported as an action on the case for damage wilfully and intentionally done with-

out just occasion or excuse, analogous to an action for slander of title. To support such action actual damage must be shown; but proof that the publication had caused a general falling off of plaintiff's business, without showing the loss of any particular customers, was sufficient proof of such damage. *Ratcliffe v. Evans*, [1892] 2 Q. B. 524 (Eng.).

TORT — NOTICE OF CLAIM FOR INJURIES — DEFECTIVE HIGHWAY. — A statute required notice to be given to the city within a certain time after the injury alleged to have been caused by defective highways within the city. Plaintiff's notice described with particularity the place and manner of the accident, and stated that he had received "severe bodily injuries." *Held*, that it was not a sufficient notice to sustain an action. *Goodwin v. City of Gardiner*, 24 Atl. Rep. 846 (Me.).

In *Blackington v. Rockland*, 66 Me. 332, a statement that "my [plaintiff's] horse was injured, at a certain time and place," was held sufficient description of the nature of that plaintiff's injury. The court in *Goodwin's Case* distinguish the early decision in language which is, to say the least, ingenious; they say that "a man can usually tell his own personal sufferings more exactly than he can describe those of a horse. A man may be able to practice an imposition as to his own personal injury, but would find it difficult to do so in respect to an injury to his horse." It is submitted that this distinction is not well taken, and that there is no real difference between the two cases.

TORT — NUISANCE — LIABILITY OF LESSOR'S GRANTEE. — A let land to B, and afterwards granted the reversion to C. B, without violating his covenants, and while making a use contemplated in the lease, created a nuisance. *Held*, that as C had no power to prevent B's acts, he was not liable; and the fact that C received rent from B was immaterial. *Lufkin v. Zane*, 31 N. E. Rep. 757 (Mass.).

A landlord becomes liable for nuisance only if he sanctions the abuse; and since C had no power to abate this nuisance, his mere act of taking the premises could not make him a wrongdoer. The court criticises *Rex v. Pedley*, 1 Adol. & El. 822, and follows *Ahern v. Steele*, 115 N. Y. 203, a case decided by a bare majority.

TORT — TRESPASS — VENUE. — *Held*, in the Court of Appeal, Lord Esher dissenting: (1) That there is no reason founded on principle why an action relating to land in a foreign country should not lie by a plaintiff in England against a defendant in England, unless the action is of such a nature that it would be impossible for the court to give a judgment which could be enforced, as, *e. g.*, an action of ejectment.

(2) That the only obstacle to such actions heretofore has been the technical law of local venue.

(3) That, therefore, since the abolition of local venue by the Judicature Rules — Judicature Acts, 1873 (36 & 37 Vict. c. 66) and 1875 (38 & 39 Vict. c. 77), and Order 36, Rule 1 — the High Court has jurisdiction to entertain an action for damages in respect of trespass to land situate in a foreign country against a defendant who is within the jurisdiction of the court. *Companhia De Mocambique v. British So. Africa Co.* — *De Sousa v. Same*, [1892] 2 Q. B. 358 (Eng.).

This decision is in accordance with the view expressed by Chief Justice Marshall in *Livingston v. Jefferson*, 1 Brock, 203. See also Story on the Conflict of Laws, § 554.

TRUST, SPENDTHRIFT — WILLS. — *Held*, that a testator may so give to his son for life the annual income of a trust estate that the life tenant cannot alienate or his creditors reach it. *Roberts v. Stevens*, 24 Atl. Rep. 873 (Me.).

English courts are opposed to such restrictions as this, and hold that a creditor of a *cestui que trust* can reach in equity whatever the latter has the right to demand from his trustee. *Brandon v. Robinson*, 18 Ves. 429.

Decisions in several of our State courts are in accord with the English rule, but others, together with two of the Federal Supreme Court, uphold such trusts. See 96 Mo. 439; 91 U. S. 716, 727; 94 U. S. 523; 135 Pa. St. 586, 596; 133 Mass. 170 (see also 146 Mass. 369; 146 Mass. 395; and 149 Mass. 307); 69 Md. 77; 59 Vt. 530.

The Legislatures of four or five States sanction similar trusts by express statutes, though Kentucky by legislative enactment forbids them 83 Ky. 306.

WILLS — POWERS. — In 1861 A made a will leaving all her estate to B. In 1867 a lot of land was conveyed to a trustee for the use of A for life, with power to dispose of it by her will. *Held*, that the power was executed by a will made previous to its creation. McIver, C. J., dissents. *Burkett v. Whittemore*, 15 S. E. Rep. 616 (So. Car.). This follows the settled English doctrine.

WILLS — INVALID PROBATE. — 1870 A, B, died, leaving a will, which was admitted to probate. Under it his widow took certain realty which she sold to T for value. 1880, one of A, B's children, who was a minor when the will was proved, petitioned to have

it set aside. This was decreed on ground that A, B, was *non compos mentis* when he executed the will. *Held*, that the proceedings under the original probate were not void, but voidable, since the court had jurisdiction, and therefore a purchaser from a devisee under the will would be protected. The court says that the case is like that of a man who buys from an executor whose appointment is revoked, where the purchaser gets a good title. *Thompson v. Samson*, 30 Pac. Rep. 980 (Cal.).

REVIEWS.

AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION. By Morris M. Cohn, Attorney-at-Law. Baltimore: The Johns Hopkins Press, 1892.

That his book is of no use to the practising lawyer as such is almost admitted by the author. Its field is in the most general study of constitutional history, — "a study showing the play of physical and social factors in the creation of institutional law," as his sub-title puts it. Its use within this field is decidedly elementary. A fairly complete, though somewhat vague, summary of the author's theories on the general philosophy of political growth, getting what semblance of unity it has from the conclusion that our Constitution, like unwritten ones, is "amenable to the under-current of national life," makes up the treatise. It is, in short, an average essay of the kind naturally so popular, in which the names and general methods of science play a larger part than any actual useful research. The author gives his judgment on many ultimate laws of history, ethics, and sociology, but treats no subject in a manner thorough enough to aid a real student.

N. H.

A TREATISE ON THE LAW OF EVIDENCE. By Simon Greenleaf, LL.D. In three volumes. Fifteenth edition, revised, with large additions, by Simon Greenleaf Croswell. Boston: Little, Brown, & Co., 1892.

The number of editions through which this work has run in the fifty years of its existence is a striking commentary on its importance. Despite the shortcomings which have been brought out by modern critical study, it is to this day a standard referred to more frequently and respectfully than any other book in its department of the law.

Mr. Croswell has added about nineteen hundred cases, mostly those decided since the last edition in 1883, and has summarized the advance of the law in several of the most important and most rapidly developing branches, by means of long and elaborate notes. So far the work is well done. The latest authorities, however, are not always given; but, as is stated in the preface, there are included "mainly such cases . . . as are deemed most important in principle or instructive as showing the tendency of the courts in new lines of decision." . . . However judicious this selection has been, it must somewhat lessen the utility of the work to a busy practitioner.

The added notes simply piece out the statements made originally by Mr. Greenleaf. They contain the recent cases, their results, and the reasons assigned by the courts, but their value would be greatly increased if Mr. Croswell had given his own conclusions in his own

words, and produced original work instead of compilation. As it stands, the book is a good piece of regulation revision, but not more.

G. R. P.

LEADING CASES DONE INTO ENGLISH, AND OTHER DIVERSIONS. By Sir Frederick Pollock, Bart. Macmillan & Co. London and New York.

It is pleasing occasionally to receive for review a book that is not to be treated too strenuously. All of us who ever unbend know what a rich field the law offers for humorous banter, especially if we have read the literature of judicial humor in the biographies of the legal great. It is the law looked at from this distance, treated in a tone of frivolous disinterestedness, that gives Sir Frederick Pollock's light verses their charm and their excuse. Those who have found his fun an oasis among the text-books will look with interest at his more airy flight. His wings, by the way, are cased in a binding of perfect taste. And it may be said to the sober that the verses follow so accurately the facts of the cases that time spent over them is not useless as a review.

N. H.

PRINCIPLES OF THE LAW OF WILLS, WITH SELECTED CASES. By Stewart Chaplin, Professor of Law in the Metropolitan Law School. New York: Baker, Voorhis, & Co. 1892. Pages xxiv, 505.

This book is admirably adapted to its purpose. It is a book for the use of students, clear, concise, teaching all branches of the laws of wills generally and none exhaustively. It is a view of the general principles that it is written to present, not of the details. The text is followed by cases without head-notes and freely shortened, and occasionally by abstracts of decisions, called "Illustrations." Fuller references are given in the notes. No extended discussions are undertaken of doubtful or difficult points; but for a clearly arranged and clearly written elementary explanation of the general law of wills, it is in every respect satisfactory.

N. H.

THE AMERICAN DIGEST. ANNUAL FOR 1892, Sept. 1, 1891, to Aug. 31, 1892. Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co., 1892.

This digest, standing fairly as the best and most complete in existence, keeps the same general form as last year. The new minor changes are improvements. The size is increased (6046 pages), the new thousand pages being due largely to many new cases, partly to the methods for increased facility in finding cases (already admirable), given by more cross-references and black letter headings.

N. H.

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A NEW VIEW OF THE DARTMOUTH COLLEGE CASE.

II.

[The notes by Chief-Justice Doe, of which the following pages constitute the second part, were made some time since in the investigation of a case then pending before the Supreme Court of New Hampshire. He may use them in preparing the opinion to be hereafter reported in that case. — EDITORS.]

WOULD the result be different¹ if the charter, instead of being granted by the Crown before the Revolution, had been granted by the Legislature since the adoption of the State Constitution in 1784? This question may arise in determining the effect to be given to the clause reserving the power of alteration, amendment, and repeal, now generally inserted in corporate charters. In construing a reserved power of amending and repealing a charter, it is necessary to inquire whether the reservation has any effect, whether the charter would be amendable and repealable without it, and whether it was a useless effort of a perpetual body of public servants to retain a power of which they were incapable of divesting themselves. By the true construction of the State Constitution

¹ [At the end of the first part of this article (6 Harvard Law Review 161, at pages 176-81) the writer reached the conclusion that the actual charter of Dartmouth College which dated from 1769, was not irrevocable, and could not legally have been made so by the king, its grantor. — EDITORS.]

have the people of New Hampshire conferred upon their legislative agents a contractual authority to deprive those agents and their principals of the whole, or any part, of the sovereign right of legislation? This is not always or generally a federal question. And whatever federal exceptions may be asserted, and whatever judgments federal mandates may require us to render contrary to our opinion, it is the duty of the court to adhere to the local construction believed to be sound. By a general abandonment or suppression of it, we should attempt to throw upon federal judges a responsibility which they cannot rightfully assume, and which they refuse to accept. The correctness of that construction being maintained here in all cases, and being carried into practical effect in the rendition of all judgments not controllable by federal process, there will be no avoidance of responsibility in either jurisdiction.

"The supreme legislative power within this State shall be vested in the Senate and House of Representatives."¹ Does this delegation of power to agents authorize them to bind themselves, their successors, and their principals by a promise that all or any part of the delegated power of making law by repeal or otherwise shall not be exercised? The power, delegated to these agents to be used by them according to their discretion and judgment, with no express or implied right of substitution, is not negotiable, and cannot be used by their assignees.² By what rule of construction does the agents' authority to make law enable them to suspend their own duty, and bind their principals, by agreeing with a third party that law shall not be made? What legal principle allows an agent to disable himself and his principal by divesting them both of the power which the agent is appointed to exercise? No one contends that the Senate and House can change the Constitution; no one denies that their valid contract, divesting them of the entire law-making power which the Constitution vests in them, would be an amendment of the Constitution; and they can no more amend it by destroying a part of that power than by destroying the whole of it. A construction established by long usage and common consent, even if it is admitted to be erroneous, may be maintained on the authority of precedent. Its judicial reversal might be unjust, and within the spirit, if not within the legal meaning, of the prohibition of retrospective laws.³ But when the true construction

¹ Const. of N. H., Art. 2.

² *State v. Hayes*, 61 N. H. 264, 323-339.

³ *Bellows v. Parsons*, 13 N. H. 256, 261; *The Genesee Chief*, 12 How. 443, 458.

is sought no constitutional line can be found running through the law-making power, and separating destructible parts of it from the rest. There is not a word in the document expressly indicating the locality or the existence of such a line. By no legal reasoning can it be inferred that the mere grant of legislative power to agents authorizes them to bind their principals by a promise that certain parts of that power shall never be exercised, or shall not be exercised during a specified time. There is no legal measure of the extent to which the State can be thus disfranchised. There is no legal test for ascertaining the portion of sovereignty that can be suspended or destroyed.

On this question the doctrine of incidental power is irrelevant. "It is . . . a general maxim that an authority to accomplish a definite end carries with it an authority, so far as the constituent can confer it, to execute the usual legal and appropriate measures proper to accomplish the object proposed."¹ But this rule of construction does not enable the grantee to amend the grant. By fair construction, a corporation has the incidental authority necessary for the exercise of its express powers; but its alteration of its powers is an amendment of its charter, which it cannot amend in the slightest degree. By reasonable implication, an agent may do what must be done for the execution of his express commission, — wherein no alteration, however minute and however necessary, can be made by him. The legislative agents of the State have no express or implied authority to alter the Constitution. It would be altered by increasing or diminishing the legislative power vested in them by the second article, and they would diminish that power if they could make a charter irrepealable. On the second day of June, 1784, when the Constitution began to be in force, they had the whole legislative power, including the power of repeal; and from that day to this, by the true construction, they have been legally incapable of diminishing that power by contract or otherwise. If there is an irrepealable charter, they have altered their commission. The second article could have been qualified by this proviso: "But, for a consideration by them deemed sufficient, the Senate and House may, by contract, restrict the legislative power of repeal within such limits as they think necessary or expedient." Under such a clause, the extent to which they could reduce the repealing power

¹ *Valentine v. Piper*, 22 Pick. 85, 92; *Com. v. Temple*, 14 Gray, 69, 77, 80; *Goodale v. Wheeler*, 11 N. H. 424, 429; *Boody v. Watson*, 64 N. H. 162, 177.

would not be a judicial question. The second article could have also been qualified by the proviso that "for a consideration by them deemed sufficient, the Senate and House may, by contract, restrict the legislative power of repeal within such limits as the Supreme Court of the State think necessary or expedient." Until this clause or its equivalent is inserted, the members of this court will not be authorized to determine, according to their notions of necessity or expediency, the bounds within which the Legislature may, by contract, restrain the repealing power. Without an equally explicit amendment, a discretionary authority to establish such bounds will not be vested in a federal tribunal.¹

But if (contrary to the foregoing views) the capacity to surrender the repealing power is held to exist in the Legislature, what language shall be deemed to afford sufficient evidence of a legislative intention to make such surrender?

The power of legislation operates on all persons and all property. It is granted by all for the benefit of all. It is a part of government, and need not be reserved. When exemption from it is not granted by express contract, a corporation is no more exempted than an unincorporated company or an individual would be, carrying on the same business.² Whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other, the same principle applies, and the rule of construction must be the same.³ "This rule is elementary. . . . In Charles River

¹ Upon this subject of the surrendering capacity of the Legislature, see the following conflicting authorities; Opinion of R. B. Taney, dated Sept. 5, 1833, in 45 Niles's Register, 151, Nov. 2, 1833; *Fletcher v. Peck*, 6 Cranch, 87, pp. 134, 135, and 143; *Gooyler v. Georgetown*, 6 Wheat. 593, 595, 598; *East Hartford v. Hartford Bridge Co.*, 10 Howard, 511, 534, 535; *Debolt v. O. Co.*, 1 Ohio State, 563, 578, 579, 581, 582; *M. Bank v. Debolt*, 1 Ohio State, 591; *Knoop v. Piqua Bank*, 1 Ohio State, 603; *Toledo Bank v. Bond*, 1 Ohio State, 622; *s. c. Bank v. Wilbor*, 7 Ohio State, 481, 504, 509; *State Bank of Ohio v. Knoop*, 16 Howard, 369, 404, 407, 415, 416, 427, 428, 429, 431, 432; *Ohio L. I. & T. Co. v. Debolt*, 16 Howard, 416, 441, 442, 443, 444, 451; *Beer Co. v. Massachusetts*, 97 U. S. 25, 33; *Stone v. Mississippi*, 101 U. S. 814, 817, 819, 820; *New Orleans v. Houston*, 119 U. S. 265, 275; *Butchers' Co. v. Crescent Co.*, 111 U. S. 746, 750, 751; *Tiedemann, Police Power*, 190; *Horne v. Rouse*, 8 Wallace, 430, 443, 444; *New Jersey v. Yard*, 95 U. S. 104, 114, 115; *Mott v. P. R. Co.*, 30 Penn. State, 9, 27, 29, 35, 36, 38; *E. Saginaw M. Co. v. E. Saginaw*, 19 Mich. 259, 273, 274, 275, 276, 277, 282; *Thorpe v. R. Co.*, 27 Vt. 140, 146; *R. Co. v. Reid*, 64 N. C. 155, 160.

² *Province Bank v. Billings*, 4 Pet. 514, 561, 562, 563.

³ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547, 548, 549, 550; *Richmond R. Co. v. Louisa R. Co.*, 13 How. 71, 81; *Binghampton Bridge*, 3 Wall. 51, 74, 75, 82; *Turnpike Co. v. State*, 3 Wall. 210.

Bridge v. Warren Bridge¹ the court said this rule of construction was not confined to the taxing power."² There is no surrender of the right of taxation, or any other power of sovereignty, unless the surrender is expressed in terms too plain to be mistaken.

If the point were not already adjudged it would admit of grave consideration whether the Legislature can give up the power of taxation any more than they can give up the police power or the power of eminent domain. But the point being adjudged, the surrender, when claimed, must be shown by clear, unambiguous language.³ It can only be done by a clear expression of the legislative will.⁴ The language in which the surrender is made must be clear and unmistakable.⁵ If, on any fair construction, there is a reasonable doubt whether the contract is made out, the doubt must be solved in favor of the State. The language used must be of such a character as, fairly interpreted, leaves no room for controversy.⁶ Every reasonable doubt should be resolved against it. It is in derogation of public right, and narrows a trust created for the good of all.⁷ A reasonable doubt is fatal to the claim. *Prima facie*, every presumption is against it. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.⁸ The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare, and axiomatic in the federal court.⁹

The New Hampshire rule of charter construction is, in substance and effect, the same as the federal. The legal construc-

¹ 11 Pet. 419, 548.

² Stone v. F. L. and T. Co., 116 U. S. 307, 326; O. Co. v. Debolt, 16 How. 416, 435; Jefferson Branch Bank v. Skelly, 1 Black, 436, 446; Gilman v. Sheboygan, 2 Black, 510, 513; P. R. Co. v. Maryland, 10 How. 376, 393.

³ Delaware Railroad Tax, 18 Wall. 206, 225, 226.

⁴ P. R. Co. v. Maguire, 20 Wall. 36, 42.

⁵ Erie R. Co. v. Pennsylvania, 21 Wall. 492, 499; Memphis G. L. Co. v. Shelby County, 109 U. S. 398, 401.

⁶ Bailey v. Magwire, 22 Wall. 215, 226.

⁷ Tucker v. Ferguson, 22 Wall. 527, 575.

⁸ West W. R. Co. v. Supervisors, 93 U. S. 595, 598; Farrington v. Tennessee, 95 U. S. 679, 686.

⁹ F. Co. v. Hyde Park, 97 U. S. 659, 666; Hoge v. R. Co., 99 U. S. 348, 355; Memphis R. Co. v. Com'rs, 112 U. S. 609, 617; Newton v. Com'rs, 100 U. S. 548, 549, 561, 562; S. R. Co. v. Wright, 116 U. S. 231, 236; V. R. Co. v. Dennis, 116 U. S. 665, 667, 668; Tennessee v. Whitworth, 117 U. S. 139, 145; Given v. Wright, 117 U. S. 648, 655; C. R. Co. v. Guffey, 120 U. S. 569, 575; Cooley, Taxation, 70, 205; Cooley, Const. Lim., 394, 395; The Elsebe, 5 C. Robinson, 155.

tion of a charter or other statute is the ascertainment of the Legislature's intention. In one sense, their intent is a matter of law: it is a question for the court. In another sense, it is a matter of fact: it is to be determined by the natural weight of competent evidence.¹ The weight of the evidence is not fixed by an arbitrary rule of strict or liberal construction. But the consequences of a contract wholly or partly releasing one person or all persons from governmental control render it highly improbable that such a surrender is ever intended. A total release of all, rescinding the express agreement written in the first article of the Constitution, dissolving the body politic formed by that agreement, and substituting anarchy for government, differs in degree only and not in kind, from a partial release of one. Whether an alleged abdication and dissolution is total or partial, perpetual or temporary, the inherent improbability of a revolutionary intent is competent evidence, and its natural weight is not overcome by anything less than very clear proof. Legislators are agents² employed, not in the rescission, but in the performance, of the social contract; and between a total and a partial rescission, no line of legal principle can be drawn as a boundary of their agency.

But the integrity of their principals is not to be unnecessarily impugned by other agents employed in the judicial department. The social contract requires an exact and constant adherence to justice and honesty as virtues indispensably necessary to preserve the blessings of liberty and good government.³ And the construction, settled in this State by universal understanding and usage, applies the doctrine of equitable estoppel to such partial and temporary relinquishments of legislative power as have heretofore been made and acquiesced in. When a promised exemption from taxation, for a term not exceeding ten years,⁴ has induced the promisee to make an investment which the promisors desired him to make, he cannot be defrauded by a repudiation of the promise. If any of the promisors deny the authority of their agents to make the exempting bargain with him, their objection should be seasonably presented for enforcement by an adjudication of the rights of both parties that will prevent his relying upon a promise judi-

¹ *State v. Hayes*, 61 N. H. 264, 330.

² N. H. Bill of Rights, Art. 8.

³ N. H. Bill of Rights, Art. 38; Const. of N. H., Art. 83.

⁴ 58 N. H. 624; *State v. Express Co.*, 60 N. H. 219, 259; *Boody v. Watson*, 63 N. H. 320.

cially decided, or universally believed to be valid. When their silence and apparently unanimous assent have led him to change his position, and won for them the stipulated benefit of the investment made by him on the faith of the exempting agreement, they cannot contest their agents' authority to make the agreement. The public and every individual, and all corporations, public and private, are held to one standard of probity. Neither the State nor a municipality can gain an unfair advantage from the promisee's ignorance of law by postponing, till his investment is completed, an objection which is unseasonable after they receive the benefit of their agents' unauthorized contract, and which an honest man, in their situation, would raise before that time or never. Whether this construction is theoretically sound, we need not inquire. It has been settled too long to be disturbed, and is too firmly planted in moral principle to excite a desire for its reversal. It detracts nothing from the necessity of strong evidence to show an intention of the Legislature to exercise a releasing power which they do not possess, and which cannot be sustained against a seasonable objection.

The enacting clause of English statutes is said to have come into general use as late as the reign of Charles II. When parliamentary legislation recognized the ancient supremacy of the king by taking the form of a petition of the two houses granted by him,¹ his enactment of such a statute as a corporate charter without the concurrence of either house was naturally written, like his conveyance of property, in the terms of a grant. But a valid act of incorporation, by whomever made and in whatever terms expressed, is a law, and a law must be either temporary or perpetual. It was argued in the College case that the charter was made irrevocable by clauses that made it a perpetual law.²

"Some statutes are temporary, others are perpetual. A temporary statute continues in force, unless it be sooner repealed, until the time for which it is made expires; a perpetual one until it is repealed. . . . Every statute for the continuance of which no time is limited, is perpetual, although it be not expressly declared so."³ *Ridley v. Bell*⁴ was an action of debt on a temporary statute, made to be in force from March 25, 1694, to May 17, 1697, and made perpetual by an Act of 1695. In the volume of "Acts and Laws of

¹ 1 Bl. Com. 181.

² 4 Wheat. 651, 679, 681, 682, 689.

³ Bac. Abr. Statute (D).

⁴ Lutw. 215, 221.

His Majesty's Province of New Hampshire," printed in 1771, under the head of "Temporary Laws," are twenty-six statutes, made to be in force for terms varying from two to twenty years. They are preceded by an Act of Parliament, limited in duration at the time of its passage in 1713, and "Made perpetual by 4 George I. c. 12." In 1769, when the College charter was issued by the Provincial Governor in the name of the king, the distinction, and the legal purpose and effect of the distinction, between perpetual laws continuing in force until repealed, and temporary ones continuing in force during their expressed terms, unless sooner repealed, were perfectly understood in this Province and in England. On neither side of the ocean did any one imagine that the division of statutes into these two classes made either class or both irrevocable or contractual. It was as well understood then as it is now that one law is called temporary because it will expire at the end of its term, if not sooner repealed, and that another is called perpetual because it contains no limit of duration, and will be perpetual if not repealed. Valid Acts of Incorporation are laws; and the construction that makes them irrevocable because they are either temporary or perpetual makes all laws irrevocable for the same reason.

The usual form of limitation in the temporary laws of the Province was, "This Act to continue and be in force for the term of — years, and no longer." In a perpetual law it is not necessary to say, "This Act shall continue and be in force forever." Such a provision would be nothing more than correct construction. An Act of Incorporation, like any other statute, is not temporary unless made so by express limitation; and whether it is temporary or perpetual, it is to be construed like other statutes, unless there is some distinct and sufficient reason for an exception to the general rule. The section, "This Act shall continue and be in force for the term of fifty years, and no longer," would have the same meaning in a charter as in any other law; and the section, "This Act shall be in force forever," would be as superfluous in one as in the other.

The limiting clause means "This Act, if not sooner repealed, shall continue and be in force for the term of — years, and no longer. The perpetuity clause means "This Act shall be in force until it is repealed," or "This Act is not temporary." Either clause, of itself alone, held to have a meaning in Acts of Incorporation, which it does not have in other laws, would be an anomalous and groundless exception. Construing either clause, without more, to be a contractual and irrevocable surrender of repealing power,

would be a violation of the rule that requires clear proof of intended abdication. Language used in every other case for the sole purpose of enacting that a repealable law is or is not temporary, is not clear proof of a purpose to make an incorporating law irrepealable. Legal terms, of established signification, naturally and ordinarily expressing an intention to fix the duration of a repealable law, are no evidence of an express or implied contract for the surrender of repealing power.

A law may contain the terms of an express contract. When the Legislature say, "Towns may by vote exempt" manufacturing establishments from taxation "for a term not exceeding ten years, . . . and such vote shall be a contract binding for the term specified therein,"¹ the intention to authorize towns to relinquish tax power is plainly expressed, and the necessity of plain expression is recognized. Equally explicit is their enactment "that upon any of the aforesaid banks accepting and complying with the terms and conditions of this Act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters."² When they say, "This charter shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law,"³ there is no doubt of their purpose to surrender the power of repeal. They may express their surrendering purpose in less explicit terms, but when they intend to release any one from their repealing power, it cannot be presumed that they will leave their intention to be inferred from terms that have always been used merely to set forth the temporary or perpetual character of all forms of repealable law, including corporate charters and grants of corporate rights.

On the subject of a relinquishment of governmental power, the charter of Dartmouth College is silent. There are no words which import a relinquishing contract, and none can be implied. "If we maintain" that there is such a contract, "we must create it by a legal fiction, in opposition to the truth of the fact and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of" their "power over their own internal police."⁴ If there was no implied

¹ Gen. Laws of N. H., c. 53, § 10.

² *Gordon v. Appeal Tax Court*, 3 How. 133, 146.

³ *State v. Noyes*, 47 Me. 189, 203; *R. Comr's v. P. R. Co.*, 63 Me. 269, 281; *Home v. Rouse*, 8 Wall. 430, 431, 432.

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 548, 549, 552.

promise of the State to abstain from destroying the value of the Charles River toll bridge, and the value of its charter, by building a parallel and contiguous free bridge, there was no implied promise to abstain from a repeal of the charter.¹ That argument has not been answered; and under the true rule of charter construction adopted by the Federal and State courts, such charters as those of Dartmouth College and the ordinary railroad charters are not surrenders of the legislative power of amendment and repeal. Notwithstanding the suggestion of Judge Story in the College case,² that a reservation of that power is always necessary to prevent an implied surrender of it, subsequent decisions of the federal court adopt the true rule that the reservation is not necessary for that purpose. A surrender, actually intended and plainly expressed, would not be accompanied by a reservation of the surrendered power. If the surrender is not plainly expressed, it cannot be implied, and the reservation is superfluous. This is the logical result of the federal cases, and on the questions of State law arising in this case, we are at liberty to take correct views and to reject the doctrines of surrendering authority and implied surrender, that are generally, if not universally, admitted to be unsound, though not overruled in all their applications by the federal court.

The Senate and House could not surrender or suspend the legislative power of altering and repealing a corporate charter. Their reservation of the right of alteration and repeal in the modern charters and in the Revised Statutes³ was a formal resolution to abstain from a contract they could not make, to keep a right they could not give up, and to leave to their successors what they could not withhold from them. Wholly inoperative under the true construction of the Constitution and charter, the reservation has all the effect it was designed to have. It protects the State against federal decisions which erroneously take it for granted that the delegation of law-making power to an endless series of legislatures authorizes them at any time to destroy the power continuously and perpetually vested in them and their successors, and that their destruction of it may be presumed without evidence. But even if they could destroy it, and if the reservation of it in the modern charters had been omitted, the true construction of those charters would have shown no destroying or suspending contract. Without the reservation, there would have been no more evidence of such a contract, or of any State contract, than there is with it.

Charles Doe.

¹ Story, J., in 11 Pet. 616, 617.

² 4 Wheat. 708, 712.

³ Ch. 146, § 26.

WAIVER OF TORT.

IF any one in the commission of a tort enriches himself by taking or using the property of another, the latter may in some cases, instead of suing in tort to recover damages for the injury done, sue in assumpsit to recover the value of that which has been tortiously taken or used. The remedies in tort and assumpsit not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and if he elect to sue in assumpsit, he is said to waive the tort. The doctrine of waiver of tort is simply a question of the election of remedies.¹ With equal propriety, therefore, when an election is made to sue in tort, one could say that the quasi-contractual obligation is waived. It is usual, however, to speak of waiver of tort only, for the reason that the remedy in tort is the older. The tort is, however, waived only in the sense that a party having a right to sue in tort or assumpsit will not, after he has elected to sue in assumpsit, be allowed to sue in tort. By such an election that which was before the election tortious does not cease to be so. In fact, when the assumpsit is brought, it is only by showing that the defendant did a tortious act that the plaintiff is able to recover. There being no contract between the parties, unless the defendant is guilty of some wrong the plaintiff can establish no cause of action against him.² Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of *indebitatus assumpsit* when brought to enforce a right of action not resting on contract,³ much of the confusion in, and conflict of, decisions now existing would have been avoided. The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given at common law, but as to the real nature of the right.

Assuming a defendant to be a tortfeasor, in order that the doctrine of waiver of tort may apply the defendant must have unjustly

¹ *Cooper v. Cooper*, 147 Mass. 370; *Huffman v. Hughlett*, 11 Lea, 549.

² *Huffman v. Hughlett*, 11 Lea, 549.

³ *Louisiana v. Mayor, etc.*, 109 U. S. 285; *People v. Speir*, 77 N. Y. 144; *Sceva v. True*, 53 N. H. 627.

enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort.¹

Thus in *Patterson v. Prior*,² the plaintiff brought an action for the value of his services against the warden of a prison and a lessee of convicts, claiming that his imprisonment was illegal and void. The action was allowed against the lessee because he had derived a benefit from the services of the plaintiff, but was disallowed as to the warden, for the reason that though he had been a tortfeasor, he had derived no profit in the commission of the wrong. The doctrine of waiver of tort, so far as it involves the doctrine of enrichment is thus ably summed up by Lord Mansfield, in *Hambly v. Trott*:³—

"If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

"So far as the tort itself goes, an executor shall not be liable; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged."

It is true that you cannot sue in *assumpsit* a person who commits an assault and battery, while you can sue in *assumpsit* one who steals your goods and sells them. But it is submitted that the true reason is not that suggested by a learned writer,⁴ that it would be absurd in the one case to assume that the defendant promised to make compensation for the damage done, while in the other case there are facts which would support the implication of a promise. In the one case there is no enrichment, in the other

¹ *Hambly v. Trott*, Cowp. 371 (*semble*); *Powell v. Rees*, 7 A. & E. 426 (*semble*); *Ex parte Adamson*, 8 Ch. Div. 807 (*semble*); *Patterson v. Prior*, 18 Ind. 440; *Tightmyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, 20 Kan. 235; *National Trust Co. v. Gleason*, 77 N. Y. 400; *New York Guaranty Co. v. Gleason*, 78 N. Y. 503.

² 18 Ind. 440.

³ Cowp. 371.

⁴ Cooley on Torts, 108.

there is; hence in the one case your remedy is in tort only, while in the other you can sue in quasi-contract.

It has been held that it is not sufficient for the plaintiff to prove that the defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity.¹

In *Phillips v. Homfray*,² one of the questions raised was whether the plaintiff could recover against the defendant as executor of one who had used plaintiff's underground roadway for the carrying of coal without the plaintiff's consent. The majority of the court (Lords Justices Bowen and Cotton) held that he could not, Baggallay, L. J., dissenting. The following paragraphs, from the opinion of Lord Justice Bowen, give sufficiently the ground of the decision:

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. The mere fact that the wrongful act or neglect saved the testator from expense is not sufficient justification for suing his executor.

"The deceased, R. Fothergill, by carrying his coal and ironstone in secret over the plaintiffs' roads, took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved *his estate expense*, but he did not bring into it any additional property or value belonging to another person."

¹ *Phillips v. Homfray*, 24 Ch. Div. 439.

² 24 Ch. Div. 439.

It is respectfully submitted that the decision in *Phillips v. Homfray* unnecessarily limits the scope of the doctrine of waiver of tort. While it is true that the theory of restitution requires the existence of minus and plus quantities, it is equally true that enrichment can be negative as well as positive, and that one who saves an expenditure by using the property of another, as in *Phillips v. Homfray*, does thereby enrich himself. From an equitable point of view it would seem that wrongful *user*, and not wrongful deprivation, of another's property, resulting in the enrichment of the tortfeasor, should be the principle underlying the doctrine of waiver of tort. Should not the estate of one who has used, without the consent of the patentee, a patented idea, respond to the patentee to the extent of the tortfeasor's unjust enrichment? Yet it would seem difficult, except on the principle of wrongful user, to reach the estate. The tortfeasor, owing to the nature of the right which he has violated, has not deprived the patentee of his property, or excluded him from the enjoyment thereof. At the same time that the tortfeasor is violating the patentee's right, the latter, and any number of persons with his consent, can use the same. During the commission of the tort he has every right which he had before; namely, the right to the exclusive use of the idea. Except on the principle of wrongful user, it seems impossible, also, to support the right of a carrier to waive the tort and sue for freight where one fraudulently and in violation of the rights of the carrier has his goods carried from one place to another, it not appearing that the presence of the goods has required any additional effort on the part of the carrier, or that it has caused him to lose the carriage of other goods.¹

But it does not follow that the measure of the recovery is to bear any relation to the amount of profit made by the defendant. The plaintiff in a case of this sort should recover such a sum as the jury would have been authorized to give, had there been a contract between the plaintiff and the defendant that the latter should pay the reasonable value of his user. Any question as to incidental or collateral profit made by the tortfeasor — in fact, the entire question of profit — should be excluded. Thus, if A, by the wrongful use of B's roadway, should perform a contract which could not otherwise have been performed, and thereby make a profit of \$10,000, the question in determining the amount of B's recovery would be, not what profit did A make, but what amount

¹ See *Rumsey v. N. E. R. W. Co.*, 32 L. J. C. P. 244.

should he have paid B, had he contracted to pay a reasonable sum for the use of the roadway.¹

There is a class of cases to be carefully distinguished from *Phillips v. Homfray*, in which the plaintiff is undoubtedly allowed to recover, although he in fact shows no damage. In these cases it will be found that the defendant has professed to act on behalf of the plaintiff, and that the plaintiff recovers, by virtue of the doctrine of ratification, on the theory of agency. Waiver of tort is not at all involved. This is made apparent by two illustrations. A, professing to act as agent for B, though really having no authority so to act, collects a debt due from C to B. By the collection of this money, — assuming C not to have been thereby rendered insolvent, — A has done B an injury. B's position is just what it was before; he is a creditor of C, and has a right to collect from him the amount of his debt. A has in truth committed a tort, not towards B, but towards C, who can sue him either in tort, in assumpsit, for a breach of warranty of authority, or in a count for money had and received. Therefore, if B's right of action against A had to be worked out through the doctrine of waiver of tort, B would have none; since as between himself and A there has been no tort committed. But by ratifying A's act, the relation of principal and agent is created, and A becomes liable to B in a count for money had and received.² If, however, we assume that C is indebted to B, and that A, claiming not to act for B, but to be in fact C's creditor, collects the debt, then B has no claim whatever against A, — not on the theory of waiver of tort for the reasons just stated, and not on the theory of ratifying A's act, because there can be no ratification, A not having professed to act for B.³ It would seem that in the case last supposed, B's remedy would be in tort alone, even if it appeared that by the collection of the money, C had been

¹ When the writer first read the decision in *Phillips v. Homfray*, he was of the opinion that the decision was wrong. Subsequently he was inclined to adopt the view of the majority of the court, because of the difficulty of formulating a principle which would not unduly extend the scope of waiver of tort. The principle stated in the text, it is hoped, will be found to meet the difficulties that may be suggested as arising from a departure from the decision.

² *Clarence v. Marshall*, 2 Cr. & M. 495; *Brown v. Brown*, 40 Hun, 418. Conf. *Andrews v. Hawley*, 26 L. J. Ex. 323.

³ *Vaughan v. Matthews*, 13 Q. B. 187; *Hall v. Carpen*, 27 Ill. 386, 29 Ill. 512; *Cecil v. Rose*, 17 Md. 92 (*semble*); *Davis v. Smith*, 29 Minn. 201; *Nolan v. Manton*, 46 N. J. L. 231; *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 450. See, *contra*, *O'Conley v. City of Natchez*, 9 Miss. 31.

made insolvent, and that B had in consequence been unable to realize his debt. For in such a case the property which has been added to A's estate was not B's, but C's, and the right to recover the money or an equivalent sum is in C, and not in B.

The distinction to be drawn between a case where the defendant professes to act for another, and where he claims to be acting in his own right, is well illustrated by *Vaughan v. Matthews*.¹ In that case the plaintiff, as executor, sought to recover from the defendant money which the defendant had collected in the following circumstances: the plaintiff's testatrix had loaned money, taking in exchange a note payable either to "Miss Vaughan" (the testatrix), or to "the Miss Vaughans." The jury were unable to decide in which form the note was made. The plaintiff's testatrix died, leaving a sister, who afterwards died, leaving the defendant her executor. The defendant, the note, when it reached his hands, being in form payable to "the Miss Vaughans," collected the amount thereof. The plaintiff claimed that the note was made payable to his testatrix, and had been fraudulently altered so as to make it purport to be payable to "the Miss Vaughans," and consequently to the defendant's testatrix as survivor. It was held that on these facts the plaintiff was not entitled to recover: not on the theory of following the proceeds of property tortiously taken from the plaintiff or his testatrix, because by the fraudulent alteration the note given to the plaintiff had ceased absolutely to exist, and consequently the money collected by the defendant was not the proceeds of property belonging to the plaintiff; and not on the theory of agency, because the defendant claimed to be acting, not for the plaintiff, but in his own right.

The decision itself in *Vaughan v. Matthews* seems open to criticism. Assuming the note to have been absolutely destroyed and extinguished by the alteration, still the note held by the defendant was the proceeds of the original one. Of this second note the defendant should have been treated as a constructive trustee, and as a consequence the plaintiff should have been allowed to recover the proceeds of the note held on the constructive trust.

As the foregoing principles have not been uniformly applied in all cases where a tortfeasor, by the commission of a tort, has enriched himself, it becomes necessary to consider in detail the

¹ 13 Q. B. 187.

several classes of cases in which the question of waiver of tort has arisen.

When the defendant has converted the plaintiff's property, and in the act of conversion, or thereafter, sells the same, the plaintiff may waive the tort and sue in assumpsit, using the count for money had and received to recover the proceeds of the sale.¹

In *Lamine v. Dorell*,² which is the case most often cited for this proposition, it would seem that the defendant fraudulently procured letters of administration on an estate upon which the plaintiff was entitled to administer, and that, acting under these letters, he sold certain debentures belonging to the estate. The defendant's letters being subsequently revoked, and others being granted to the plaintiff, the latter sued the defendant, in a count for money had and received, to recover the proceeds arising from the sale of the debentures, and was allowed to recover.

The reasoning of the court in this case will appear from the following extracts:—

"POWELL, J. When the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reasons of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as for money received to his use."

And Chief-Justice Holt, speaking of the effect of a recovery in this form of action upon the right to sue in tort, said,—

"This recovery may be given in evidence upon *not guilty* in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion."

Lamine v. Dorell would seem to be a proper case for a true ratification, since the defendant professed to be acting for the estate represented by the plaintiff. But if we deal with it as an ordinary case of waiver of tort, it is evident that the theory of treating the sale as made with the plaintiff's consent is a pure fiction, adopted

¹ *Lamine v. Dorell*, 2 Ld. Ray. 1216; *Oughton v. Seppings*, 1 B. & Ad. 241; *Young v. Marshall*, 8 Bing. 43; *Powell v. Rees*, 7 A. & E. 426; *Thornton v. Strauss*, 79 Ala. 164; *Hudson v. Gilliland*, 25 Ark. 100; *Staat v. Evans*, 35 Ill. 455; *Leighton v. Preston*, 9 Gill, 201; *Gilmore v. Wilbur*, 12 Pick. 120; *Knapp v. Hobbs*, 50 N. H. 476; *Budd v. Hiler*, 3 Dutch. 43; *Comstock v. Hier*, 73 N. Y. 269; *Olive v. Olive*, 95 No. Ca. 485; *Hall v. Peckham*, 8 R. I. 370; *Thompson v. Thompson*, 5 W. Va. 190.

² 2 Ld. Ray. 1216.

to meet the supposed difficulties of the action of assumpsit. This action in its origin, whether brought in the form of special assumpsit or *indebitatus assumpsit*, was intended to give a remedy for a breach of a true contract.¹ That is what is meant by Powell, J., when he says it is hard to turn a tortious act into a contract and against the reasons of assumpsits. It must also be remembered that when this case was decided (1705) the doctrine of waiver of tort was in its infancy. It had been ruled as late as 1675² that in the case of a conversion and sale of goods, an action of assumpsit for money had and received could not be maintained. While it must be admitted that notwithstanding the establishment of the doctrine of waiver of tort, many of the courts, even in jurisdictions where all forms of action have been abolished, continue to use much the same phraseology as that in *Lamine v. Dorell*, still, the preferable form of statement is that employed by Park, J., in *Marsh v. Keating*,³ in the House of Lords:—

“ Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her whether the right of the transferee to hold the stock be strengthened or not. She is looking only to the right of recovering the purchase-money. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.”⁴

As the desire to give a remedy in assumpsit begot the fiction, and not the fiction the desire, and as the fiction does not reach all the cases where the doctrine of waiver of tort applies, but must give place, if fictions are to be adopted, to others if possible even more violent, — *e. g.*, when an action is brought in assumpsit against a thief or embezzler to recover money stolen or embezzled, — there is no reason or excuse for continuing the fiction at the present day.

If the act by which the plaintiff has been deprived of his property was never in itself an actionable tort, but simply an incident of another tort, increasing the amount of damages recoverable for

¹ Ames, History of Assumpsit, 2 Harvard Law Review, 53.

² Phillips v. Thompson, 3 Lev. 191.

³ 1 M. & A. 582.

⁴ It is only fair to state that in another part of his opinion the learned judge states in substance the argument of the court in *Lamine v. Dorell*.

the latter, then, notwithstanding the defendant has sold property acquired by his tortious act, an action will not lie to recover the proceeds.¹ Hence a disseisee of land, the disseisor, by the act of disseisin, becoming the owner thereof, cannot maintain an action for money had and received against the disseisor to recover the proceeds arising from the sale of timber.²

As the amount of the plaintiff's recovery is limited to the proceeds received by the defendant,³ it will be fatal to this form of action that the amount is not ascertainable. Hence it has been held that where goods placed by the plaintiff with the debtor of defendant were received by the defendant from his debtor on account of the debt, with other goods belonging to the debtor himself, the plaintiff could not recover because of his inability to prove the valuation put upon his goods.⁴

While in order to support the count for money had and received, the tort being waived, it is not sufficient to prove that the defendant has disposed of the plaintiff's property by way of barter or exchange,⁵ still it is not in all cases necessary to show that he has actually received money itself. If, having a right to receive money, he accepts something in lieu thereof, the transaction will be treated as if he had first received the money, and then had bought with it that which in fact he received in the first instance in place of the money.⁶

On the other hand, though the defendant has sold the goods, if he has not collected the purchase-money, or received its equivalent as just explained, he will not be liable in a count for money had and received. Thus, in *Budd v. Hiler*⁷ the defendant tortiously sold property belonging to the plaintiff, receiving at the time of the sale only a part of the purchase-money, and taking a note for the remainder. The plaintiff sought to charge him in a count for money had and received, with the entire purchase-money; but his recovery was limited to the amount of cash actually received.

¹ *Balch v. Patten*, 45 Me. 41; *Rogers v. Inhabitants of Greenbush*, 57 Me. 441; *Bigelow v. Jones*, 10 Pick. 161.

² *Bigelow v. Jones*, 10 Pick. 161.

³ *Lindon v. Hooper*, Cowp. 414 (*semble*); *Budd v. Hiler*, 3 Dutch. 43.

⁴ *Saville v. Welch*, 58 Vt. 683.

⁵ *Kidney v. Pinous*, 41 Vt. 386.

⁶ *Ainslie v. Wilson*, 7 Cow. 662; *Miller v. Miller*, 7 Pick. 133; *Doon v. Ravey*, 49 Vt. 293.

⁷ 3 Dutch. 43.

Since to maintain an action for money had and received in this class of cases the plaintiff must prove the receipt of money by the defendant as well as a wrongful conversion, his cause of action does not arise until the defendant has received the proceeds of the sale; and therefore the Statute of Limitations begins to run only from that time, and it is no answer to a count for money had and received that since the sale and receipt of the proceeds and before action brought the right to sue in trover has been barred. The period of limitation in such a case is that applicable to actions of assumpsit.¹

In *Dougherty v. Chapman*,² it was held that where a count for money had and received is brought to recover the proceeds arising from the sale of property converted, interest is recoverable only from the time when a demand is made for the proceeds, the action being a sufficient demand. The following extract from the opinion of Hall, J., shows the line of reasoning adopted by the court: —

“The plaintiff’s right to waive the tort and sue in assumpsit for the proceeds of the sale was authorized by an implied promise, raised by law, on the part of the defendant that he would pay the money to the plaintiff. This right of election on the part of the plaintiff rests upon the fiction imposed at his pleasure upon the misconduct of the defendant. By electing to waive the tort, the plaintiff became entitled to the proceeds of the sale; but up to that time he was not entitled to such proceeds. The right to the proceeds accrued by force, and at the moment of election, and not before. As the plaintiff was not entitled to the proceeds of the sale until he made the election, as a matter of course he was not entitled to interest thereon prior thereto.”

This case is certainly inconsistent in principle with the rule laid down in *Miller v. Miller* as to the Statute of Limitations, and in the opinion of the writer is not to be supported. The decision rests entirely upon a proposition which the writer has attempted to show is fallacious;³ namely, that by suing in assumpsit, one in some mysterious way converts that which was until then simply a tort, into a contract. Whereas in truth one has an election of remedies because he has independent rights, and does not acquire rights, as the court here assumes, by electing remedies. If, for example, a man deals with an agent whose agency is not disclosed, — where, upon the doctrines applicable to an undisclosed agency, the party

¹ *Miller v. Miller*, 7 Pick. 133.

² 29 Mo. Ap. 223.

³ See *supra*, p. 223.

with whom the agent deals can elect to hold the undisclosed principal, — no one would say that his right did not accrue until he so elected. But in truth there is no difference in principle: in the case of the undisclosed principal, the alternative rights are acquired by the making of the contract; in the case of property being converted and sold, the right to receive the proceeds arises from the receipt of the money. At that moment of time the tortfeasor has imposed upon him the obligation to deliver the money to the party whose property has been converted. If he is under no such obligation then, and dies before an election is made to sue in assumpsit instead of in tort, upon what principle can his executor or administrator be held liable? The representative of the deceased has committed no tort, and confessedly is not liable at common law for the tort of the deceased. How can he be held liable for money had and received, as he clearly is, if no such right existed against the tortfeasor?

Assuming that the Statute of Limitations runs, not from the time of the conversion of the property, but from the time of the receipt of the money arising from the sale, the question arises, Within what time must the money be received? Suppose, for example, that property is sold either at the time of conversion or afterwards, and that the money is not received until after the Statute of Limitations has barred an action for the tort. Can the plaintiff still recover the proceeds? If the sale is not made until the injured party has lost his right to sue for the conversion, the tortfeasor has acquired title, and the sale was a sale of his own property.¹ In such an event, therefore, though the writer knows of no case in point, it would seem clear that the injured party has no right to receive the proceeds. If, however, the title to the property is in the injured party at the time of the sale, it would seem that the running of the statute subsequent thereto, but prior to the receipt of the money by the defendant, should not affect the plaintiff's right. He is equitably entitled to the debt as the proceeds of his property, and hence to the money realized on it. The tortfeasor, so long as a specific *res* exists into which the injured party's property can be traced, is in fact a constructive trustee.

To entitle one to waive the tort and sue for the proceeds arising from the sale of converted property, it has been held to be sufficient if he proves that he had *possession*; it is said that he need not

¹ Ames, *The Disseisin of Chattels*, 3 *Harvard Law Review*, 321, 322.

establish title to the property.¹ This result was deduced from the well-established rule of law that possession is a sufficient basis for the action of trover or trespass. Thus, in *Oughton v. Seppings*,² a widow who sued for the proceeds of personal property sold by the defendant, was allowed to recover, although the defendant proved that the property was purchased in the lifetime of the plaintiff's husband; Lord Tenterden, C. J., saying, —

“There was evidence here, though perhaps slight, that the plaintiff was in possession of the pony. If she was in possession at the time when it was seized, she might clearly have maintained trespass against a wrong-doer; and if she might maintain trespass, she may waive the tort and maintain this action.”

Since one has a right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that where the plaintiff's money has been tortiously obtained by the defendant, the tort may be waived and an action for money had and received be brought.³

It is of course no defence to such an action that the money was obtained, not from the plaintiff, but from one to whom the plaintiff intrusted it, and with whom defendant was engaged in an illegal transaction. For in such a case the plaintiff claims in his own right and not through his agent, and therefore the illegality of the transaction is immaterial. Thus, in *Clarke v. Shee*⁴ the plaintiff sued the defendant in a count for money had and received to recover money which had been received by the plaintiff's clerk in the course of the plaintiff's business, and used by the clerk in the purchase of lottery tickets from the defendant in violation of the Lottery Act. It was held that the plaintiff was entitled to recover. Lord Mansfield, delivering the opinion of the court, said, —

“I think the plaintiff does not sue as standing in the place of Wood, his clerk, for the money and notes which Wood paid to the defendants are the identical notes and money of the plaintiff. Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be

¹ *Oughton v. Seppings*, 1 B. & Ad. 241.

² 1 B. & Ad. 241.

³ *Clarke v. Shee*, Cowp. 197; *Catts v. Phalen*, 2 How. 376; *Burton v. Driggs*, 20 Wall. 125; *Jones v. Inness*, 32 Kan. 177; *Cory v. Freeholders*, 47 N. J. L. 181; *People v. Wood*, 121 N. Y. 522; *Webb v. Fulchire*, 3 Ire. (Law) 485; *Heindill v. White*, 34 Vt. 558; *Kiewest v. Rindkopf*, 46 Wis. 481; *Western Assurance Co. v. Towle*, 65 Wis. 247.

⁴ Cowp. 197.

brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."

It has also been held to be no defence to an action brought to recover money fraudulently obtained, that the plaintiff supposed the payment of the money to be called for by an illegal contract which he had made with the defendant, if in fact the money was not payable under the contract, but was obtained by the defendant's fraud.¹ In *Catts v. Phalen*,² the plaintiff sued to recover money paid to the defendant in the belief that the latter was entitled to it under a lottery drawing. The defendant, who was employed to draw the tickets from the wheel, in fact obtained the money by concealing in his sleeve a ticket with a number corresponding to the number of the ticket held by him, and pretending to draw the ticket from the wheel. He pleaded the illegality of the lottery. The court, assuming the drawing to be illegal, decided for the plaintiff, Baldwin, J., saying, —

"The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to or drew the prize, it was paid and received on the false assertion of that fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place."

As a condition of recovering money tortiously obtained, the plaintiff, if he has received anything of value from the defendant, must return the same. And since the plaintiff's claim rests upon the fact that the defendant cannot be allowed in good conscience to keep what he has obtained, the measure of the plaintiff's recovery is not the entire amount paid by the plaintiff, but the amount which it is against conscience for the defendant to keep.³ In the *Western Assurance Co. v. Towle*,⁴ the defendant by false and fraudulent overstatements as to the amount of a loss (which

¹ *Catts v. Phalen*, 2 How. 376; *Northwestern Ins. Co. v. Elliott*, 7 Sawyer, 17; *Webb v. Fulchire*, 3 Ire. (Law) 485; *Kiewest v. Rindkopf*, 46 Wis. 481.

² 2 How. 376.

³ *Lindon v. Hooper*, Cowp. 414 (*semble*); *The Western Assurance Co. v. Towle*, 65 Wis. 247.

⁴ 65 Wis. 247.

had in part been suffered) got from the plaintiff the amount of the policy as for a total loss. There was a clause in the policy declaring forfeiture thereof in such an event. The plaintiff having recovered a verdict for the amount of the policy, it was set aside, the court holding that the recovery should have been limited to the money received over and above the actual loss suffered. Taylor, J., said, —

“ . . . The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid. . . . False swearing and false valuation in proof of loss might have been a good defence to a recovery upon the policy, had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants.”

Since the right to recover money which has been stolen, fraudulently obtained, or wrongfully converted to another's use, rests on the equitable principle of unjust enrichment, the claim may be asserted, not only against the immediate tortfeasor, but against any one into whose possession the money may be traced until it reaches the hands of a purchaser for value without notice.¹ As the claim is, however, maintained on strict equitable principles, it cannot be asserted against a purchaser for value without notice.² Of course payment to the tortfeasor after notice of plaintiff's claim is no answer to the action.³

As the fees incident to an office belong equitably to the rightful claimant, and not to the usurper, the latter is liable for all such fees received.⁴ Since, however, the claimant's right to receive the fees for services actually rendered by another rests upon

¹ *Calland v. Lloyd*, 6 M. & W. 26; *Heilbut v. Nevill*, L. R. 5 C. P. 478; *Bayne v. United States*, 93 U. S. 642; *United States Bank v. State Bank*, 96 U. S. 30; *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268; *Causidere v. Beers*, 1 Abb. Ap. Dec. 333; *Hindemarch v. Hoffman*, 127 Pa. St. 284.

² *State Bank v. United States Bank*, 114 U. S. 401; *Bank of Charleston v. State Bank*, 13 Rich. Cas. 291.

³ *Hindemarch v. Hoffman*, 127 Pa. St. 284.

⁴ *Howard v. Wood*, 2 Lev. 245; *Arris v. Stukeley*, 2 Mod. 260; *Kessel v. Zeiser*, 102 N. Y. 114.

his ownership of the office, it follows that he can only recover the fees necessarily incident to the office. Consequently mere gratuities received by the usurper cannot be recovered.¹ In such a case the plaintiff cannot make out his right, since what was given to the defendant might not have been given to the plaintiff. It is true that but for the tort the defendant could not have received the gratuity, but *non constat* that the plaintiff, if the defendant had not committed the tort, would have received it.

Where the defendant entices away the plaintiff's apprentice and induces the latter to work for him, the plaintiff is entitled to recover the value of the services received by the defendant.² The opinion of Mansfield, C. J., in *Lightly v. Clouston*, in which this proposition of law was first announced, was as follows:—

“I should have thought it better for the law to have kept its course; but it has now been long settled that in cases of sale, if the plaintiff chooses to sue for the produce of that sale, he may do it. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice; that he is consequently entitled to an equivalent for that labor, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer that he obtained that labor, not by contract with the master, but by wrong, and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold and the money has found its way into the pocket of the defendant.”

If one is liable to the master for the benefit received from the services of an apprentice whom he has enticed from the service of the master, it would seem necessarily to follow that one who has wrongfully deprived another of his personal property and used it, should be liable in quasi-contract for the benefit derived from the use thereof. Lord Mansfield was clearly of this opinion, — the following illustration, used by him in *Hambly v. Trott*,³ being in point: “So if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor,

¹ *Boyer v. Dodsworth*, 6 T. R. 681.

² *Lightly v. Clouston*, 1 Taunt. 112; *Foster v. Stewart*, 3 M. & S. 191; *James v. Le Roy*, 6 Johns. 274; *Stockett v. Watkins' Adm'rs*, 2 G. & J. 326. See, however, *contra*, *Crow v. Boyd*, 17 Ala. 51.

³ 5 Cowp. 377.

though it would against him; but an action for the use and hire of the horse will lie against the executor."

It has accordingly been held that the action will lie to recover the value of personal property wrongfully taken and used.¹ The right has also been denied in at least two cases.² The decision in *Carson v. River Lumbering Co.* is however much weakened by the quasi-admission of the court that if the tortfeasor were dead, the action would be allowed against his executor or administrator. But if not against him, why against his representative, since the tortfeasor, and not the representative, is the one who did the wrong and derived the benefit? If it be answered that the remedy in tort against the tortfeasor is adequate, it may be replied that the whole doctrine of waiver of tort exists notwithstanding the existence of the remedy in tort. Likewise, the argument by which the plaintiff was defeated in *Wynne v. Latham* could be used to defeat every plaintiff proceeding on the theory of waiver of tort. In that case Ruffin, J., said: "Most actions will only lie on a contract express or implied, and the contract here is supposed to be one of the latter kind. But the law cannot imply a contract between these parties when it is clear from the facts stated that the defendants derived their possession and title from another person, under whom they claimed the slaves adversely to the plaintiff and all the world." This is of course treating a fiction as if it were a fact, and applying it, not to further the ends for which it was adopted, but to defeat them.

One who has been dispossessed of his land should logically be allowed to sue the wrongful occupant in a count for use and occupation, to recover its rental value; but it is not permitted.³ The failure to extend the doctrine to this class of cases is due to purely historical reasons. Where the tort was waived at common law, and an action brought to enforce the quasi-contractual obligation, the form of action used was the *indebitatus assumpsit* counts. But it was a cardinal principle of the common law that in bringing an action a

¹ *Fanson v. Linsley*, 20 Kan. 235; *Philadelphia Co. v. Park Brothers*, 138 Pa. St. 346.

² *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249; *Wynne v. Latham*, 6 Jones L. 329. See *Phillips v. Homfray*, 24 Ch. Div. at p. 460.

³ *Tew v. Jones*, 13 M. & W. 12; *Stringfellow v. Curry*, 76 Ala. 394; *Stockett v. Walker*, 2 G. & J. 326; *Central Mills Co. v. Hart*, 124 Mass. 123; *Lockwood v. Thunder Bay Co.*, 42 Mich. 536; *Henderson v. Detroit*, 61 Mich. 378; *Crosby v. Horne Co.*, 45 Minn. 249; *Aull Savings Bank v. Aull*, 80 Mo. 199; *Dixon v. Ahern*, 19 Nev. 422; *Preston v. Hawley*, 101 N. Y. 586; *Collyer v. Collyer*, 113 N. Y. 442.

plaintiff must pursue his highest remedy. Where land was leased and rent reserved, the remedy given by the common law was debt; and that being regarded as a higher remedy than *indebitatus assumpsit*, the rent could not be recovered in an *indebitatus assumpsit* count. It would have been extraordinary had the courts given a remedy against a tortfeasor which they did not allow on a contract against a tenant. And although by statute the scope of *indebitatus assumpsit* has been extended to cases where the relation of landlord and tenant exists, the courts have not permitted its use in the absence of a true contract between the parties; and even in jurisdictions where all forms of action are abolished, this doctrine, originating in a distinction drawn between different forms of action, is perpetuated.¹ As *assumpsit* will not lie for a wrongful use and occupation, of course the rent received by such an occupant cannot be recovered in a count for money had and received.²

The question of waiving the tort has arisen in a class of cases suggested by, and yet differing from, those in which the defendant has wrongfully used the plaintiff's personal property; namely, where the defendant has converted the property, but, instead of selling, either keeps it or has consumed it. Here the decisions are in conflict. In *Russell v. Bell*,³ the plaintiff, as assignee of a bankrupt, sought to recover against the defendant, in a count *for goods sold and delivered*, the value of goods delivered to the defendant by the bankrupt after he had committed an act of bankruptcy. A motion by the defendant's counsel to enter a nonsuit, on the ground that the plaintiff had failed to prove a contract of sale, was denied. Alderson, B., thought the evidence warranted the finding of such a contract. Lord Abinger thought that it was not necessary for the plaintiff to prove a contract in order to recover in the count for goods sold and delivered; saying, —

“Mr. Crompton says that if you treat this as a sale, you must treat it as a sale with all the circumstances belonging to it. That proposition is true, with this qualification, — if the sale is made by an agent, and properly conducted for the supposed vendor, and the person buying is an honest buyer, the vendor must stand to the sale, and is bound by the

¹ See cases *supra*, note 1. The reader who may be interested in studying the history of this doctrine is referred to a very lucid and most instructive article by Professor Ames on “*Assumpsit for Use and Occupation*” in 2 *Harvard Law Review*, 377.

² *Clarence v. Marshall*, 2 C. & M. 495; *Lockard v. Barton*, 78 Ala. 189; *King v. Mason*, 42 Ill. 223.

³ 10 M. & W. 340.

contract; but if a stranger takes my goods, and delivers them to another man, no doubt a contract may be implied, and I may bring an action either of trover for them, or of *assumpsit*. This is a declaration framed on a contract implied by law. When a man gets hold of goods without any actual contract, the law allows the owner to bring *assumpsit*, — that is the solution of it, — and gets rid of the whole difficulty.¹ Here the bankrupt took these goods and delivered them to the defendants; on that an implied *assumpsit* arises that they are to pay the owners the value of the goods."

Gurney, B., concurred in the decision of the court, but gave no opinion. On this question the authorities in America are pretty evenly divided.²

In *Jones v. Hoar*³ — the leading case in this country denying the right of waiver of tort under such circumstances — the court seemed to proceed on the short ground that they could not without greatly extending the doctrine of waiver of tort beyond any of the decided cases apply to the count for goods sold and delivered the principles which had been applied to the count for money had and received. As against the tortfeasor himself, they were not willing to take this step; though they left open the question as to whether such an action might not be brought against his executor or administrator. But as the writer has had occasion to remark, how can such an action be maintained against the representative, if not against the tortfeasor? It is the latter, and not the former, who committed the tort, and has directly profited by it. If the action is denied against the tortfeasor because of his liability in tort, then the court, to be consistent, should reach the same result in all cases where the defendant can be sued in tort. If one

¹ The italics are the writer's.

² The action has been allowed in the following States: *California*, *Lehmann v. Schmidt*, 87 Cal. 15; *Georgia*, *Newton Manuf. Co. v. White*, 53 Ga. 395; *Illinois*, *T. W. W. R. R. Co. v. Chew*, 67 Ill. 378; *Indiana*, *Morford v. White*, 53 Ind. 547; *Kansas*, *Fanson v. Linsley*, 20 Kan. 235; *Michigan*, *Aldine Manuf. Co. v. Barnard*, 84 Mich. 632; *Mississippi*, *Evans v. Miller*, 58 Miss. 120; *New York*, *Goodwin v. Griffis*, 88 N. Y. 629; *North Carolina*, *Logan v. Wallis*, 76 No. Ca. 416; *Tennessee*, *Kirkman v. Phillips*, 7 Heisk. 222; *Texas*, *Ferrill v. Mooney*, 33 Tex. 219; *West Virginia*, *McDonald v. Peacemaker*, 5 W. Va. 439; *Wisconsin*, *Walker v. Duncan*, 68 Wis. 624.

The action has been disallowed in the following States: *Alabama*, *Strother v. Butler*, 17 Ala. 733; *Arkansas*, *Bowman v. Browning*, 17 Ark. 599; *Delaware*, *Hutton v. Wetherald*, 5 Harr. 38; *Maine*, *Androscoggin Co. v. Metcalf*, 65 Me. 40; *Massachusetts*, *Jones v. Hoar*, 5 Pick. 285; *Missouri*, *Sandeen v. Kansas City R. R. Co.*, 79 Mo. 278; *New Hampshire*, *Smith v. Smith*, 43 N. H. 536; *Pennsylvania*, *Bethlehem Borough v. Perseverance Fire Ins. Co.*, 81 Pa. St. 445; *South Carolina*, *Schweizer v. Weiber*, 6 Rich. L. 159; *Vermont*, *Winchell v. Noyes*, 23 Vt. 303.

³ 5 Pick. 285.

can sue a tortfeasor to recover, not the actual money which he has taken from the plaintiff by fraud or force, but its value, that is, an equivalent sum, or to recover the value of services of which the defendant tortiously deprived the plaintiff to his own benefit, then why not allow an action to recover the value of goods which he has tortiously taken? That you are suing in a count *for goods sold and delivered*, whereas in fact there is no sale, but a tort, is an objection no more insurmountable in this case than when the same count is used to charge a lunatic for necessities furnished to him by one who knew him to be insane. In the latter instance there is no contract of sale, because the lunatic cannot contract; and yet, as he has received the plaintiff's goods under circumstances which render it inequitable for him to keep them without making compensation, the plaintiff is allowed to recover their value.¹ If, then, the count can be successfully used in a case where there is no contract of sale because the defendant is incapable of assenting to one, why can it not be used where there is no assent because the defendant is a tortfeasor? In truth, the two cases have a common element, which is universally recognized in the one, and should be in the other, as furnishing a ground for recovery; namely, that the defendant has that for which in conscience he should give the plaintiff an equivalent in money. The objection arising out of the form of action should, of course, have no force in jurisdictions where all forms of action have been abolished. It is not to be supposed that the estate of the tortfeasor would not be required, when the tortfeasor has taken and consumed the plaintiff's goods, to make good their value to the plaintiff; and yet every argument that can be urged against the tortfeasor can be urged against allowing it against his representatives, except the argument that an adequate remedy exists in the first case, but not in the second. And this argument, applying with no more force here than elsewhere, has been generally ignored in the law of quasi-contract.²

¹ *In re Rhodes*, 44 Ch. Div. 94; *Sceva v. True*, 53 N. H. 627.

² Whether a plaintiff has a right to waive the tort in a case of this kind, is of great importance in jurisdictions where the Statute of Limitations prescribes a shorter period of time within which actions in tort must be brought than that prescribed for the bringing of actions in assumpsit or contract. Thus, in *Kirkman v. Phillips*, 7 Heisk. 222, where the plaintiff sued for the value of goods converted by the defendant, the latter pleaded that three years — the time allowed by the Tennessee statute for actions of tort — had elapsed. This plea was held bad, the action sounding, not in tort, but in quasi-contract. "It is true," said the court, "as argued, that the wrongdoer may obtain a title to the property by three years' adverse possession, and yet be liable, for

If the plaintiff can trace goods into the possession of the defendant which were procured from the former under a contract made with a third person, the contract being induced by fraud in which the defendant co-operated, it would necessarily result, if the principle contended for in the preceding paragraph be granted, that the plaintiff can waive the tort and sue for goods sold and delivered, the fraud entitling him to rescind the contract under which he parted with the goods. And such is the law.¹ In *Hill v. Perrott*,² where this point was first decided, the plaintiff sold goods to one Dacosta, who was to pay for them by a six months bill of exchange, to be accepted by the defendant and indorsed by Dacosta. The plaintiff, discovering the transaction to be a swindling scheme to enable Dacosta to pay a debt which he owed to the defendant, and finding the goods in the defendant's possession, sued in assumpsit, the declaration containing two counts, — one for goods sold, and one in special assumpsit. He recovered judgment on the count for goods sold.

In *Ferguson v. Carrington*,³ the plaintiff sued for goods sold and delivered. It appeared that the time of credit given when the goods were sold by the plaintiff to the defendant had not expired. It was objected that the action was prematurely brought; but the plaintiff contended that as the sale was induced by the fraud of the defendant, he might waive the tort and sue in assumpsit. The plaintiff was nonsuited, and a rule for a new trial was refused; the court holding that by bringing that form of action he had affirmed the contract, and so was bound by its terms, including the time of credit.

Parke, J., whose opinion represents that of the other judges, expressed himself as follows:—

“As long as a contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action they affirm the contract made between them and the defendant.”

three years after his title is perfected, to pay the original owner the value thereof. This is a necessary consequence of the right, which the original owner has, to elect whether he will sue for property or its value. During six years his right for the value is as perfect as his right to sue for the property within three years. This right is not interfered with by the Provisions of the Code abolishing the distinctions in the form of actions. The Statute of Limitations applicable to the cause depends upon the nature and character of the action, and not upon its form.”

¹ *Hill v. Perrott*, 3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369; *Danig v. Freeman*, 13 Me. 90; *Isaacs v. Herman*, 49 Miss. 449.

² 3 Taunt. 274.

³ 9 B. & C. 59.

Now, with all deference to so eminent an authority, it is submitted that this decision cannot be supported. To do so, one must say that the count for goods sold and delivered can only be used to enforce a genuine contract obligation. But this view is not sustained by either the English or American courts.¹ If the count can be used where there has been no contractual relation, it must follow that a plaintiff does not in using the count necessarily allege the existence of a contract. If he does not, then, in a case where he has a right to disregard the contract and sue in tort, why cannot he waive the tort and sue in assumpsit for goods sold and delivered, without affirming a contract which was in fact made, but which he has a right to rescind? The result of the English authorities, if Lord Abinger's statement in *Russell v. Bell*² is to be regarded as law, is to leave the law in an anomalous state. As against a tortfeasor whose tort consists in getting your goods by means of a fraudulent contract, you cannot waive the tort and sue in assumpsit for goods sold and delivered; but you may bring a count for goods sold and delivered against a person whose tort consists in procuring your goods otherwise than by a fraudulent contract.

Ferguson v. Carrington has been followed in Massachusetts.³ Although it was followed in an early case in Michigan,⁴ this decision can no longer be regarded as law, it having since been decided in the same State⁵ that this count can be used for a taking and retention where there has been no contract whatever. In Kentucky,⁶ in New York,⁷ and in Georgia,⁸ a recovery is allowed in cases like *Ferguson v. Carrington*.

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(To be continued.)

¹ See above, *passim*.

² *Supra*, p. 239.

³ *Allen v. Ford*, 19 Pick. 217.

⁴ *Wilson v. Foree*, 6 Johns. 110; *Weigand v. Sichel*, 4 Abb. Ap. Dec. 592. The reasoning given by the court in *Wilson v. Foree*, 6 Johns. 110, is as follows: "The basis of every contract is good faith. If the special contract be void on the ground of fraud, the plaintiff may disregard it, and bring assumpsit for the goods sold." Substituting the word "voidable" for "void," this is a concise and accurate statement of the reasoning by which the result can be reached, and is in striking contrast with the fanciful statements found in the opinion of the court in *Weigand v. Sichel*, 4 Abb. Ap. 592.

⁵ *Blalock v. Phillips*, 38 Ga. 216.

⁴ *Galloway v. Holmes*, 1 Doug. 330.

⁵ See *supra*, p. 240, n. 2.

⁶ *Dietz's Assignee v. Sutcliffe*, 80 Ky. 650.

THE BORDERLAND OF LARCENY.

I.

THE common law crime of larceny differs from such a crime as homicide in that it shades off on every side into the region of mere tort. When one human being is killed by another, the question of crime depends solely upon the intent with which the act was committed. But when a man's property is wrongfully interfered with, the act is criminal only under certain conditions; and the line between such interference as is criminal and such as is a mere tort is purely arbitrary, being founded on no distinction in the nature of things. As a result, there is on all sides a debatable ground, where the act may conceivably be held a crime, or with equal inherent reason may not. The difficulty is not diminished by the fact that the borders of criminality have been extended by statutes, whereby such crimes have been created as embezzlement, cheating, cheating by false pretences, malicious mischief, forcible trespass, etc. The question still remains, whether the act is a crime by the common law or by statute. I purpose to discuss only a single aspect of this subject.

From the beginning, the common law has limited the crime of larceny to cases of wrongful taking from the possession of the owner without his consent. In some early authorities it was stated simply that the taking must be against the will of the owner (*invito domino*).¹ Glanville² states the rule more fully: "The party shall be absolutely excused from the imputation of theft by reason that his possession of the thing detained originated through the owner of the property." Staunforde elucidates the point with his usual care: "The intent must be at the time when he came into possession of the goods; for if he had the possession lawfully, although he should afterward with ill intent convert the goods to his own use, yet it is not felony. As, if I bail my goods to one; who converts them to his own use; as appears P. 13, E. 4, f. 9. But if an innkeeper puts a piece before one to drink from it, and he carries it off, it is felony, because he had not

¹ Bract. 150 b; Fleta, bk. i. c. 38; Mirror, c. i. § 10.

² Bk. x. c. 13.

the possession of it, only the use. The same is law of the butler or cook in my house, who have my plate or vessel to use, and they carry it off; it is felony, because the possession is always in me."¹

Mr. Justice Stephen thinks that this rule was a limitation more or less consciously put upon a former broader principle of the common law in order to restrain the scope of larceny, while at the same time the scope of trespass was extended by the action of trover, the purpose being that the owner might have his goods again.² This, however, can hardly be. There is no evidence of a former broader principle, nor was it necessary; for the owner had always the option of suing civilly rather than criminally.³ In truth, the limitation seems to have been inherent in the nature of a common law felony. That act alone was punishable by appeal or indictment which was done *contra pacem regis*, or, in other words, *vi et armis*.⁴ Thus, in *Rex v. Raven*,⁵ where one who had hired lodgings stole the furniture, it was agreed by Lord Bridgeman, Kelyng, J., and Wylde, Recorder of London, that it was no felony, "because she had a special property in them by her contract, and so there could be no trespass; and there can be no felony where there is no trespass, as it was resolved in the case of Holmes, who set fire on his own house in London, which was quenched before it went further."

It thus appears to have been a general rule of the common law that there is no felony without trespass. And if, as seems clear, the action of trespass is derived from the appeal of felony, the cause of this broad rule is apparent. When the rule is applied to the crime of larceny, it is evident that in those cases where trespass lies there may be larceny, but in cases where detinue or account lies there is no felony;⁶ and therefore that when goods are delivered up by the owner there can be no larceny.

Starting from this point, it follows that the state of mind of the defendant at the time of taking is immaterial. If the owner gives over the possession voluntarily, the fact that he has been induced to do so by deceit of the other cannot alter the fact of delivery. There is no trespass, no *vi et armis*, and therefore no felony. The wrong is not a trespass, but a fraud. It is different where the

¹ Staunf. Pl. Cor. fol. 25.

² 3 Steph. Hist. Cr. L. 133.

³ Bract. 150 b; Brit. fol. 49. See a note by Professor Ames, 3 H. L. R. 29; see also 3 H. L. R. 177.

⁴ *Per* Brian, C. J., 13 Ed. 4, 9, pl. 5; 3 H. 7, 12, pl. 9.

⁵ Kelyng, 24.

⁶ 21 H. 7, 14, pl. 21.

consent of the owner is extorted by force or fear. In that case the possession is not voluntarily parted with, and the wrong-doer is just as much guilty of trespass in taking the property as he would have been if the formal consent had not been given.¹

The difficulty in the older cases was to determine what constituted a giving up of possession. The natural and obvious rule was generally laid down, that where the owner's chattel remained in his house or in his personal presence it continued to be in his possession. Thus in the Year Book, 21 H. 7, 14, pl. 21, Pigot (apprentice) put this case to Cutler, Serjeant: "If I deliver (*bail*) a bag of money to my servant to keep (*al gard*), and he flees and escapes from me with the bag, is it felony? Cutler said, Yes; for so long as he is in my house, or with me, whatever I have delivered to him is adjudged in my possession."² Staunforde used language to the same effect: "The thing stolen seems never to have been out of the owner's possession, because it had not passed outside his house."³ So far was this notion carried that we find in good use the phrase, "outside the possession of the house."⁴ In accordance with this view, a guest who, with felonious intent, carried goods from one room to another of an inn, was regarded as never having taken them from the innkeeper's possession,⁵ and a servant or workman to whom were given goods to keep or to work upon, had no possession.⁶ So a guest had no possession of the plate upon which his dinner was served.⁷

On the other hand, where goods were delivered to any one, servant or stranger, to carry away, the owner surrendered possession.⁸ Thus, in the Year Book, 21 H. 7, 14, pl. 21, "Cutler said: If I deliver a horse to my servant to ride on a journey, and he absconds with it, it is not felony; for he came lawfully by the horse by delivery. And so it is if I give him a bag to carry to London, or to pay some one, or to buy something, and he absconds with it, it is not felony; for it is out of my possession, and he comes lawfully by it. *Pigot*. It may well be; for the master in all those cases has a good action against him, namely, Detinue, or Action of Account."⁹ This rule prevailed until the end of the last century.¹⁰

The diversity was not acquiesced in by every one. It was some-

¹ Reg. v. Lovell, 8 Q. B. D. 185.

² S. C. Bro. Abr. Coron. pl. 58.

³ Staunf. Pl. Cor. 26.

⁴ Bro. Abr. Coron. pl. 159.

⁵ Staunf. Pl. Cor. 26.

⁶ 21 H. 7, 14, pl. 21; Kelyng, 35.

⁷ Bro. Abr. Coron. pl. 159.

⁸ 13 Co. 69, and cases cited; Moore, 248, pl. 392.

⁹ S. C. Bro. Abr. Coron. pl. 58.

¹⁰ Watson's Case, 2 East P. C. 562.

times held that a servant, even while in his master's house, has possession; as, for instance, a butler of the plate in his charge.¹ To settle this conflict in the authorities the statute 21 H. 8, c. 7, was passed; it provided that when chattels are delivered to a servant by his master to keep, and the servant converts them, it shall be felony.² This statute was soon held not to apply to a delivery to a servant by a stranger outside the master's house.³ And it never was held to cover the case of delivery to the servant to carry to a distance.⁴ By the end of the last century, however, the reason for the diversity was lost sight of; and it was held that where the servant had goods from the master, although it were to carry to a distance, the possession remained in the master.⁵ This decision, though opposed to the former authorities, and unsupported on principle, has been followed, and is now law.

The old conception of possession, according to which the master has possession of all chattels in his house or presence, still survives in an analogous case. When the master sends a servant to get goods from a stranger in a cart, boat, or other vehicle in the master's possession, the goods come into the master's possession as soon as they are put into the vehicle; and if the servant afterwards takes them out *animo furandi*, he is guilty of larceny.⁶ But the rule has broken down where it should have been strongest. When a stranger gave goods to a servant for his master in the master's house, the goods would clearly, according to the old notion of possession, have been held to be at once in the master's possession.⁷ But at the end of the last century it was finally determined that in such a case the servant got possession. The case was that of a bank teller, who upon receiving money for the bank, put it in his

¹ *Brian* [C. J.]. It cannot be felony, because he could not take *vi et armis*, because he had charge of it. And the Justices were of the same opinion. — 3 H. 7, 12, pl. 9.

² It has been supposed by some that the "doubt" stated in the preamble was upon another point; namely, whether the servant sent to a distance with goods had possession. But there seems to be no authority in the books clearly opposed to that proposition, which indeed, upon the notion of possession then prevailing, was obvious. On the other hand, the then recent case just cited certainly left doubtful the nature of a servant's relation to the master's chattels of which he had charge in the master's house; and that must have been the doubt referred to. This opinion is confirmed by the language of the statute, which applies only to a delivery to a servant to keep.

³ *Dyer*, 5.

⁴ *Watson's Case*, 2 East P. C. 562.

⁵ *Lavender's Case*, 2 East P. C. 566 (1793).

⁶ *Reg. v. Reed*, 23 L. J. N. S. M. C. 25; *Rex v. Spears*, Leach C. C. (4th ed.) 825.

⁷ See the opinion of Holmes, J., in *Com. v. Ryan*, 30 N. E. Rep. 364 (Mass.).

own pocket; and it was held not to be larceny.¹ This decision was the cause of passing the statute 39 Geo. 3, c. 85, which created the crime of embezzlement. The statute applied only to a taking by a clerk or servant; but it has been extended by later statutes so as to cover most, if not all, cases of taking by bailee or other mere possessor. It is still sometimes difficult to distinguish the crimes; for instance, just what dealing with goods by a servant is enough to give the master possession has been the subject of much argument.² But upon the whole, the boundary between larceny and embezzlement is now clearly established, whatever may be our view as to the correctness of it.

II.

Let us now return to the general principle with which we began, that there can be no larceny if there was a delivery by the owner. I have stated it to be incontestable that no matter what motive operated on the owner's mind to induce the delivery, if there was in fact a voluntary parting with possession, there should be no larceny.

There is little trace of any other theory until the end of the last century,—a period marked by gross misconception in other respects of the true nature of larceny. In 1779 a different rule was established by the decision in *Pear's Case*.³ In that case it appeared that the defendant hired a horse under pretence of taking a journey, but at once sold and delivered it to a stranger; such having been his intention from the beginning. The court held this to be felony, in spite of delivery by the owner; for the original intent having been fraudulent, "the parting with the *property*"⁴ had not changed the nature of the *possession*, but that it remained unaltered in the prosecutor at the time of the conversion." That this decision was a novelty, and an unwarranted modification of the law of larceny, appears upon an examination of the authorities cited by the court.

One of the authorities cited as sustaining the decision was a case in Sir Thomas Raymond's Reports.⁵ The defendant "cheaped" goods in a shop; the shopkeeper handed him some of the

¹ *Bazeley's Case*, Leach C. C. (4th ed.) 835. Eyre, C. J., "observed that the cases ran into each other very much, and were hardly to be distinguished."

² See *Com. v. Ryan*, 30 N. E. Rep. 364 (Mass.).

³ 2 East P. C. 685; 1 Leach (4th ed.) 212.

⁴ That is, right of possession,—a sense in which the word was then much used.

⁵ *Rex v. Chissers*, T. Raym. 275. See also the case put in *Kelyng*, 82.

goods, and he thereupon ran away with them. Nothing could be plainer than this case. The defendant was not given possession of the goods; he was allowed to take them in the owner's presence, and they continued in the owner's possession. That the owner in such a case continues in possession is settled by many decisions;¹ and the case is therefore no authority for the decision in Pear's Case. This fact was pointed out by East, who adds that it "was mentioned by some of the judges on the conference as a matter proper for consideration, whether cases of that description were not governed by the principle that the legal possession still remained in the owner of the goods notwithstanding the delivery, he continuing present?"² though others thought that too refined, as setting up a legal fiction against the fact, which ought never to be done in criminal cases."³

Another authority cited by the court is the puzzling passage in Littleton:⁴ "If tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have thereof against him action of trespass; as if I deliver to one my sheep to dung his land, or my oxen to ear his land, and he slayeth my beasts, I may well have an action of trespass against him, notwithstanding the delivery." This dictum as to the animals is unquestionably opposed to the law as I have stated it, and can be explained only as a nod of Homer, an example of the then prevailing confusion between trespass *vi et armis* and trespass on case; but it affords no comfort to the court which cited it. For it applies not to a case where the *animus furandi* existed at the time of the delivery, but to a case where the intent was formed after the bailment had come into existence. In other words, if it were followed, it would not support the doctrine of larceny by trick, but it would abolish the distinction between larceny and embezzlement, — a result far from that intended by the court in Pear's Case.

A third authority was Tunnard's Case,⁵ decided in 1729. In that case it appeared that the defendant hired a horse to ride three miles; but having gone that distance, he rode away to London and sold the horse. The case was tried before Lord Raymond, C. J.,

¹ 2 East P. C. 683; *Regina v. Johnson*, 5 Cox C. C. 372; *Com. v. O'Malley*, 97 Mass. 585; *State v. Hall*, 76 Ia. 85; *People v. Johnson*, 91 Cal. 265.

² It appears by East's note that Skynner, C. B., was of this opinion.

³ 2 East P. C. 683.

⁴ Tenures, § 71. The translation is that of Tomlins's edition.

⁵ 2 East P. C. 694.

Denton, J., and Hale, B.; and they agreed that it was felony, "because the privity was determined after he had ridden further than the agreement warranted: but if there had been no such agreement, the privity would have remained, and the riding away would have been no felony; and the C. J. who tried him having left it to the jury to consider, Whether the prisoner rode away with the horse with intent to steal it, they found him guilty."

This case supports the decision in *Pear's Case* no better than the citation from *Littleton*. The court which decided *Pear's Case* seems to have thought that the jury in *Tunnard's Case* were charged to find the intent at the time of hiring. This is, however, a misapprehension. The intent which the jury found was that with which the defendant "rode away;" that is, rode toward London, after having completed the journey for which the horse was hired. If there had been no such agreement, according to the opinion of the court, "the privity would have remained; that is, if the horse had been hired for a term, and sold, it would not have been felony; and there is no intimation that a felonious intent at the time of hiring would have been material. The decision is an application of the rule established, or supposed at that time to have been established, by the *Carrier's Case*, the only other authority cited by the court.

We must therefore proceed to consider the *Carrier's Case*,¹ the root of the whole difficulty. There it appeared that one bargained with another to carry certain bales with, etc., to Southampton, and he took them and carried them to another place, and broke up the bales and took the goods contained therein feloniously, and converted them to his proper use, and disposed of them suspiciously. Only four judges are reported as expressing their opinions in this case. Lord Chancellor Booth in the Star Chamber, and Needham, J., in the Exchequer Chamber thought that there might be larceny, even by one in possession, if the intent to steal existed at the time of conversion. "Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession." Choke, J., held that the bales only, and not their contents, were delivered; and therefore that a taking of the contents was a taking from the owner's possession. Brian, C. J., held in both courts that there could be no larceny where (as here) there had been a delivery.²

¹ 13 Ed. 4, 9, pl. 5; translation of Pollock and Wright, *Poss.*, 134; *Chap. Cas.* 296.

² The same difference of opinion between Choke and Brian had been shown before; *c. g.*, 12 Ed. 4, 8.

The opinion of the Lord Chancellor and Needham, J., if ever seriously held, had ceased to have influence before the time of Queen Mary.¹ That of Choke, J., though it rested upon a rule then well established,² seems hardly justified by the facts. It may well be that when a chest is delivered, there is no delivery of the goods within the chest; but this can be true only if the chest is an article of sufficient importance in itself to be the subject of delivery. One cannot say as a matter of fact that bagging in which a bale of goods is wrapped, or paper about a parcel, or twine with which a bundle of clothes is tied, is delivered, while the goods thereby inclosed are not delivered; and these bales appear to have been of that sort. The view of Choke, J., seems, however, now to be the prevailing one, and to have been carried to extreme lengths.³

If there was a delivery by the owner, the opinion of Brian, C. J., is the only one that can be supported on principle; but one may perhaps conjecture that the facts were otherwise. Some of the counsel for the prosecution argued as if, the bargain for carriage having been made, the defendant himself took the bales (without delivery by the owner) under pretence of carrying out the bargain, but with felonious intent, and at once converted them.⁴ And this seems to be the view of Staunforde.⁵ If these were the facts, it might well be called felony.

One thing, however, is certain, that a view of the Carrier's Case prevailed for two centuries which differed from those I have stated. From the time of Coke⁶ to that of East, almost every jurist agreed upon the view well stated by the latter:⁷ "There are some tortious acts before the regular completion of a contract, on which goods are delivered, which may determine the privity of it, and amount in law to a new taking from the possession of the owner. This principle furnishes the well-known distinction in the Carrier's Case, which seems to stand more upon positive law, not now to be questioned, than upon sound reasoning." As I have said, Tunnard's Case was an application of this principle.

During all the time from Coke to Pear's Case I have found but one opinion opposed to the prevailing view just stated; and it

¹ Staunf. Pl. Cor. 26.

² Chap. Cas. 299, note.

³ Com. v. James, 1 Pick. 375; Reg. v. Poyser, 2 Den. C. C. 233.

⁴ See the language of Vavisour and Laicon, *arguendo*.

⁵ "If I bargain with another to carry certain bales to a certain place, and he takes them, and carries to another place, . . . it will be felony." Pl. Cor. 25.

⁶ 4th Inst. 107.

⁷ 2 East P. C. 695

may have been that of Kelyng, J. As this opinion seems to be the only one known to the court which decided Pear's Case, it may be well to consider just the value to be given it.

Kelyng, J., with Lord Bridgeman and Recorder Wylde, had correctly decided that where the hirer of furnished lodgings ran away during the term with part of the furniture, the act was not felony.¹ No other decision was possible, on principle or on authority.

At the time Kelyng's Reports were in preparation, almost a generation after his death, a stray manuscript came to the editor, and was introduced into the reports, prefaced by this note: "This is not found in the original manuscript, but may be fit to be reported because said to come from Mr. Serjeant Kelyng, son to the Chief Justice."² The manuscript seems to be a memorandum of the judge, in which he deems it to be worthy of consideration whether the taking in Raven's Case was not felony, on the principle involved in the Carrier's Case; and he states that principle to be that "his subsequent act of carrying the goods to another place, and there opening of them, and disposing of them to his own use, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them."³ But," he adds, "I marvel at the case put,⁴ 13 E. 4, 9 b, That if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it but sell it, all this is no felony; but if he draw part of it out above the value of twelve pence, this is felony. I do not see why the disposing of the whole should not be felony also." This marvel is not marvellous; for the diversity is one which could not exist if the idea of the Carrier's Case expressed in this manuscript were the true one.

If the manuscript was indeed written by Kelyng, it was a hasty opinion which he did not, upon consideration, think fit to annex to his report of Raven's Case, and is very slender authority with which to support so novel a decision as that in Pear's Case. But not only was the effect of the authorities misconceived by the court, its reasoning was lamentably weak. The majority of the court argued that if there was no *bona fide* contract, — that is, if the understanding of the parties was not the same, — the contract was a mere pretence, and the case was the same as if the horse had been taken without any agreement. But this is shallow sophistry. The

¹ 1 Raven's Case, Kel. 24.

² Kel. 81.

³ This notion is founded on the argument of Vavissour in the Carrier's Case.

⁴ By Choke, J.

parties were *ad idem*; there was no mistake at all as to the terms of the contract. But even if the contract had been absolutely void, the owner voluntarily gave up the manual possession and the power of control to the defendant, and therefore there was not the trespass *vi et armis* which is essential to a common law felony.

It is too late, however, to quarrel with the decision in *Pear's Case*. It was followed within a few years by a number of cases;¹ and its doctrine, under the name of "larceny by trick," is a most vigorous one to-day.

III.

The decision in *Pear's Case* was not merely contrary to authority; it was not carried to its logical conclusion by subsequent cases. If the contract, being fraudulent in its inception, was not to be considered in *Pear's Case*, it should equally be disregarded if it had attempted to bestow the property as well as the possession on the defendant. If fraud can supply the place of force, it must be as powerful in the one case as in the other. And it would seem that the court meant to carry its rule to the extreme, and thus render useless the statutes which punished the obtaining of goods by false tokens² and by false pretences.³ The majority did, indeed, notice those statutes, and held that they were "confined to cases where credit was obtained in the name of a third person, and did not extend to cases where a man, on his own account, got goods with an intention to steal them."⁴ But surely that sort of fraud would to-day constitute larceny by trick, and in fact the majority seemed so to realize; for they thought on the whole that the two statutes named were passed to give facility in punishing cases already felony by the common law. Eyre, B., alone suggested the distinction between obtaining mere possession and obtaining title. His distinction was, however, adopted with enthusiasm, and continues to be stated as law to-day; and Lord Coleridge said in the latest case⁵ that "all the cases, with the possible exception of *Rex v. Harvey*,⁶ as to which there may be some slight doubt, are not only consistent with, but are illustrations of, the principle, which is shortly this:

¹ *Rex v. Charlewood*, 2 East P. C. 689; *Rex v. Semple*, Ib. 691; *Rex v. Patch*, Ib. 678; *Rex v. Moore*, Ib. 679.

² 33 H. 8, c. 1.

³ 30 Geo. 2, c. 24.

⁴ 2 East P. C. 689.

⁵ *Queen v. Russett*, [1892] 2 Q. B. 312, 314.

⁶ 1 Leach, 467.

If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, — that is larceny." And Pollock, B., added, "that where the prosecutor has intentionally parted with the property in his money or goods, as well as with their possession, there can be no larceny."

Yet beautifully neat as this distinction is, it is defective on both sides; for there are instances of false pretences where the title does not pass to the defendant, and instances of larceny where it does pass; and in cases where these points are decided, the courts often protest the loudest that they are following Baron Eyre's rule. There are even some acts, apparently, which are both larceny and obtaining by false pretences.

It is well established that where the owner of goods, induced by fraud, intends to part with title to the goods, the defrauding party is guilty of obtaining by false pretences, though the title in fact may not pass. The common case is that of false personation. A, pretending to be a servant of C, and to come from her, borrowed a sum of money from B and made off with it. B intended the money for C, and A got no title, yet he was held guilty of obtaining by false pretences.¹ It was also held no felony; but recent cases have overruled this part of the decision. A sent a boy to a pay table to ask for the wages of B, a fellow-workman; this was held an obtaining, by false pretences, though clearly no title passed to A.² A secured property by falsely pretending to buy for an undisclosed principal; he was held guilty of obtaining by false pretences.³

In *Regina v. Middleton*,⁴ Cleasby, B., admitting that the law was in accordance with these decisions, argued that though these were cases of false pretences, they were not cases of larceny. The decision of that case, however, established the fact that larceny is committed under such circumstances.

On the other side, too, the rule has been broken in upon, and certain acts have been held larceny, though title passed. The court in such cases always protests that the title did not pass; but that seems to be an error. The process by which the result

¹ *Coleman's Case*, 2 East P. C. 672; Leach (4th ed.), 303 *n*.

² *Reg. v. Butcher*, 8 Cox C. C. 77. See *acc. Rex v. Adams*, Russ. & Ry. 225; *People v. Johnson*, 12 Johns. 292.

³ *Com. v. Jeffries*, 7 All. 548.

⁴ L. R. 2 C. C. 48, 68.

has been reached was a gradual one;¹ it will however be enough for our purpose to consider the case in which the final step is taken.²

It was an indictment for larceny of £8 at a fair. The defendant offered to sell A a horse for £23, £8 down, and the remainder either as soon as he could borrow it at the fair, or if he was unable to borrow it, at his house, to which defendant was to take the horse. A receipt was given, to the effect that defendant sold A a horse for £23, of which £8 was paid, leaving a balance of £15 to be paid on delivery. A testified that he never expected to get back his £8. Defendant never delivered the horse. The jury were charged that if he never intended to deliver the horse, but had gone through the form of a bargain as a device to obtain A's money, and A never would have parted with his £8 had he known what was in the prisoner's mind, they should find the prisoner was guilty of larceny. The jury found a verdict of guilty, and the case was stated for the Court of Criminal Appeal, the question being whether the charge to the jury was correct.

Counsel for the prosecution was not called upon; the point was regarded as too clear for argument, and the charge below was unanimously sustained. All the judges held that the title did not pass, that there was no contract, and no intention to give up the money except by way of deposit. A. L. Smith, J., said: "I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to show how impossible it is to read into it an agreement to pay the £8 to the prisoner whether he gave delivery of the horse or not; it was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession." This was evidently an ordinary case of part payment in advance of performance. What "ample evidence" Mr. Justice Smith had in his mind is not apparent at this distance. On the contrary, both the form of the receipt and the prosecutor's own testimony show that the money was given the defendant to keep, and that the prosecutor deemed himself hardly treated, not because he did not

¹ Compare *Coleman's Case*, Leach (4th ed.), 303 *n.*; *Rex v. Nicholson*, *Ib.* 610; *Atkinson's Case*, *Ib.* 1066 *n.*; *Reg. v. Prince*, L. R. 1 C. C. 150; *Reg. v. Solomons*, 17 Cox C. C. 93; with *Reg. v. Middleton*, L. R. 2 C. C. 38; *Reg. v. Buckmaster*, 16 Cox C. C. 339.

² *Queen v. Russett*, [1892] 2 Q. B. 312; see also *People v. Rae*, 66 Cal. 423.

get back his £8, but because he did not get his horse. The case seems, in fact, to have established the doctrine that title does not pass, in case of a contract performable in instalments, until the whole contract on both sides is performed,— a most extraordinary doctrine, from every point of view. The best that can be said of such a decision is that it is a *reductio ad absurdum* of the rule in Pear's Case.

There seems now to be no stopping-point, at least in England. Wherever property is obtained by fraud, the jury may find, in the language of the charge here approved, that the owner "never would have parted with [the property] had he known what was in the prisoner's mind." Larceny has conquered the whole domain of false pretences. There is no longer any borderland between larceny and false pretences, for everything in that direction is larceny.

Joseph H. Beale, Jr.

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THE LAW SCHOOL. — The following table shows the registration of this autumn as compared with that of four preceding years : —

	1888-89	1889-90	1890-91	1891-92	1892-93
Third year	27	50	44	48	69
Second year	65	59	73	112	119
First year	73	86	101	142	135
Specials	52	59	61	61	71
Total	217	254	279	363	394

The number of new entries is 210, as against 205 a year ago.

The next table shows the make-up of four successive first-year classes, both geographically and as regards the holding of college degrees : —

HARVARD GRADUATES.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1892	27	2	17	46
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49

GRADUATES OF OTHER COLLEGES.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1892	3	5	21	29
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52

HOLDING NO DEGREE.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1892	6	2	3	11
1893	4	1	7	12
1894	20	1	10	31
1895	16	3	14	34 ¹

Total of Class.
86
101
142
135

¹ One member of '95 gave no home address.

The decrease in this year's total is entirely due to the falling off — which was expected — in the graduates of Yale. In the class of '95 there are 7 Yale men, which, speaking generally, is a large number; last year's figure, 18, was thoroughly abnormal. Of the other colleges, Brown is the steadiest feeder, sending 6, as against 8 in the class of '94, and 5 in '93. Bowdoin sends none, as against 8 last year, and none two years ago. From Amherst, Williams, and Dartmouth there come 14, as compared with 3 and 11 respectively. Bates sends 3, and Trinity, Princeton, University of California, University of Iowa, and University of North Carolina, 2 each. From all six of these together, only 6 came in the two previous years.

Readers of the May number may recall a prediction that in 1892-93 the school would show an increase over 1891-92 of 50 at the very least. The first-year class and the special students, taken together, were expected to hold their own, and in fact they have done a little better than this. But it was predicted that the second year would gain about 29, and the third year about 26; whereas the actual figures are only 7 and 21 respectively. As regards the second year, it is enough to say that the class of 1893 was wholly exceptional, both in the number of new entries and in the remarkable unanimity with which the better men came back. The loss of fifteen per cent suffered by '94 is merely normal. But the estimate for the third year was more than conservative, because it allowed for a percentage of decrease more than a fifth larger than the average in recent classes. Yet it has proved too low.

At first sight, considering how hard the school has labored to build up its third year, this seems discouraging. An examination of the history of these classes (which cannot be given here in detail) indicates, however, a simple explanation, sufficiently suggested by the following table for the class of 1892: —

Class of 1892.	HARVARD GRADUATES.		GRADUATES OF OTHER COLLEGES.		HOLDING NO DEGREE.	
	From New England.	Outside of N. England.	From N. England.	Outside of N. England.	From N. England.	Outside of N. England.
First year . . .	29	17	8	21	8	3
Second year . . .	31	14	6	10	7	5
Third year . . .	25	8	5	5	4	1

In the main, the class of 1893, and that of 1894 so far as it has gone, show the same tendencies. The former, in its first year, had 21 graduates of colleges other than Harvard coming from outside New England; in its third year it has 9. The class of 1894 had 38 of these last year, and has 29 now. That is to say, the most stable element in the School, without exception, is the body of Harvard graduates belonging to New England. The non-graduates, from whatever part of the country, are uncertain; a larger number proportionately are apt to fail — or practically to fail — in their examinations, through lack of training before entering. But the greatest loss suffered by a class is regularly among the college graduates — especially from other colleges than Harvard — who live outside New England. Some come from parts of the country where the need of the longer training has not been felt, and others from States — like New York and Minnesota — where one year of actual office work is a prerequisite for admission to the bar. It is natural that the former, and inevitable that the latter, should leave before the end of their course.

The one element in the School that does not increase, and probably will not increase, is the element that stays longest, — the contingent of Harvard men from Massachusetts. The recent growth has been chiefly among those who normally leave early. This indicates that the school is enlarging its field. There is every reason for being glad that the Harvard graduates, for two successive years, have been outnumbered on their own ground by men from other colleges; but this also means that the third year cannot with any reason be expected to increase proportionately.

A further step has been taken toward stiffening the requirements of the School, and, incidentally, toward diminishing its numbers. As the rules stood at the beginning of 1891-92, no *special student* could return to the School who had not passed in at least three subjects at the end of his first year. Last spring this was amended; no one, whether regular or special, was allowed to return unless he had passed in three subjects at the end of his first year. But if a man stood the test then, there was nothing to prevent him (if a regular student) from remaining a member of the second year as long as he liked. The restriction has now been made general. No student whatever, in any class, can come back unless he passed in at least three subjects at the preceding examinations. This cuts off men who make a bad failure in the third year, but return to try again for the degree.

By this change, not only the same requirements for entrance,¹ but the same rules as regards remaining apply to regular and special students throughout. Henceforth, therefore, no particular reference will be made in the catalogue to the latter, and, for all practical purposes, they will disappear. If a man who is qualified to join a regular class prefers to call himself a special, and be registered as such, he can do so, but he will gain by it no advantage whatever.

The New York Court of Appeals has adopted a new rule in regard to candidates for admission to the New York Bar. Time spent at a law school will not be accepted in lieu of any part of the three required years of clerkship, unless a certificate is presented from the school stating that the student's attendance has been regular throughout the entire period covered.

This has necessitated an arrangement by which men who intend to apply for admission in New York, register every day at the office in order to qualify themselves for a certificate, — a decided innovation.

The Law School Association prize for 1891-92 was not awarded. In consequence, the same three subjects are offered again, namely: —

(1) The rights and remedies of a corporation or its stockholders in respect to contracts *ultra vires*.

(2) To what extent is equity a system, not merely of remedies, but of rights?

(3) The fictions of the law: have they proved useful or detrimental to its growth?

The competition is open to members of the present third-year class, or graduates of last June. No essay is expected to contain more than fifty pages of manuscript of legal quarto size, and none will be received after

¹ See 6 Harvard Law Review, 99, May, 1892.

April 15. The address of the Secretary of the Association is 220 Devonshire Street, Boston.

The report has been widely circulated that the Harvard Law School tried and failed to secure the entire library of the late N. C. Moak, Esq., which is to go to Cornell. There is no truth in this. The School did not make any such effort, because by far the greater part of Mr. Moak's library — in particular the foreign and colonial reports — would have duplicated what is either already on the shelves at Cambridge, or is to be there very shortly.

Among the acquisitions picked up in England this summer by Mr. Arnold is a set of English, Scotch, and Irish peerage reports, which, with one exception, is probably the most complete in existence. It numbers about three hundred volumes, many of them in manuscript.

DAMAGES FOR MENTAL SUFFERING. — In view of the progress that has been made in recent years in clarifying the subject of damages for mental suffering and extending their scope, it is a disappointment to find the latest case (*Chapman v. Western Union Tel. Co.*, 46 Alb. Law J. 409) losing sight of fundamental distinctions which seemed to be at last clearly established. The plaintiff in this Georgia case is the sendee of a telegram which informed him of the desperate illness of his brother, and requested him to come. The message was delayed, in consequence of which the brother died before the plaintiff's arrival, and this action is for the statutory penalty plus damages for mental suffering. To so much of the petition as relates to damages for mental suffering the defendant demurs, and the Supreme Court holds that the demurrer was rightly sustained, — properly enough, since in Georgia failure to deliver a telegram is not in itself, apart from the statutory penalty, a cause of action for the sendee; and mere suffering, whether mental, physical, or pecuniary, gives no right to recompense unless some right is infringed.

But the court is not satisfied merely to decide the case. They go on to deny the existence of any general rule allowing damages for mental suffering. They explain the cases where such damages were allowed by the old law, such as assault and false imprisonment without contact, on the ground that the offence in these cases is wilful, and the damages punitive. They then cite cases denying the right to recover for mental suffering in cases much like the one at bar. Undoubtedly the old law would have precluded damages for mental suffering in such a case, even if there had been a right of action, — as there would have been if the plaintiff and sufferer had been the sender. If they had followed this older rule with a clear understanding of the ground on which the rule that is now so widely adopted rests, we could find fault only with their judgment.

Why go on, however, with objections that have been answered with the greatest clearness, perhaps nowhere more clearly than in a book they quote themselves, only to misunderstand, — Sedgwick on Damages. "In *Lynch v. Knight*, 9 H. L. Cas. 557, Lord Wensleydale expressed the opinion that when the only injury is to the feelings, the law does not pretend to give redress. Though Mr. Sedgwick (*Dam. § 43 et seq.*) seeks to restrict this language to the case then before the court, and disputes its accuracy as a general proposition, it may be doubted whether the learned author is

able to cite a single case sustaining his contention. He does refer to a number of cases, but in all of them the pain may be viewed as an accompaniment or part only of some substantial injury entitling the party to compensation." Of course that is exactly what the text-writer says, if "substantial" be left out; and if that adjective be emphasized, the statement is untrue; as in many of the recent telegraph cases the only large element of damages is mental suffering.

The court then indulges in some more general criticisms. "How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity." The courts all admit that an infinite quantity of suffering of any kind cannot in itself constitute a cause of action. It seems hopeless to hammer at a distinction so clear as the difference between the proposition that the infringement of an actionable right should be compensated by damages for all the proximate injury of any kind resulting to the person whose right is infringed, and the untenable proposition the court mixes up with it, that suffering alone can constitute a cause of action. The Georgia court seems to have seen this distinction just clearly enough to explain how completely they misunderstood it: "It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages?" Why not indeed? That is just what the new rule is. "Throwing away the lame pretence of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy." Truly it is; but as long as our law is what it has always been, we must grope with such "confusing technicality" as the difference between the presence and the absence of a right infringed. The failure of the court to seize this concept at a time when it is so important, so much noticed, and so clearly explained in the authorities cited by the court itself, is matter for surprise. It is perhaps unlikely that these elaborate *dicta* will be followed in Georgia. The nearest prior case in the State is one allowing damages for physical suffering. *Cooper v. Mullins*, 30 Ga. 146.

THE TRUE LIABILITY OF A MANUFACTURER FOR LATENT DEFECTS. — The Supreme Court of Minnesota have recently decided, in the case of *Schubert v. F. R. Clark Co.*, 5 N. W. Rep. 1103, that a manufacturer who, through retail merchants, puts on the market an article which to his knowledge contains latent defects liable to cause injury, must answer for injury caused by his negligence to one into whose hands the article naturally comes for use, even though there be no contract relation between the latter and the manufacturer.

On this question, both in England and the United States, there is a peculiar conflict between authority and principle. In the much over-worked case of *Winterbottom v. Wright*, 10 M. & W. 139, the Court of Exchequer do not say that if the declaration had stated a breach of duty to the plaintiff, rather than a breach of a contract with a third person, the decision would have been in favor of the defendant. In the case of *George v. Skivington*, L. R. 6 Exch. 1, the judges simply

extended the right of action for a tort to a stranger, to the contract of sale, provided he was specifically named in the contract. They should either have gone farther, or not so far; the result is sound, but the reasoning illogical.

In the United States, the case of *Thomas v. Winchester*, 6 N. Y. 397, is a leading one; but in it, as in the English cases, the underlying theory is thoroughly unsatisfactory. The decision proceeds on the ground that the defendant's negligence put human life in imminent danger. This may be advanced as an argument for requiring a greater degree of care than if the article manufactured and sold were not so dangerous, but it certainly is no reason for limiting the class of persons to whom that care is owed.

In this misleading state of authority it has been suggested that the rule of *George v. Skivington* should be extended to injured persons not specifically in the vendor's mind at the time of sale, provided such persons were members of the class by whom the vendor intended the article to be used, or by whom he might reasonably have contemplated that the article was likely to be used. The decision in *Schubert v. Clark* will be welcome to those to whom this seems the only reasonable and logical ground on which to rest the cases.

A WIFE'S RIGHT TO BE MISTRESS OF A HOME. — The case of *Shinn v. Shinn*, 24 Atl. Rep. 1022, has a head-note suited to interfere with the hopes of young lawyers of larger heart than practice. Mary B. Shinn filed, in the New Jersey Court of Chancery, a bill for support against her husband. Two weeks after his marriage Mr. Shinn had imported his bride into the home of his parents, a house already equipped with his father, mother, brother, sister, nephew, and niece. In this dwelling the young couple had a well-appointed bedroom, a piano in the parlor, and two seats at the family board. After a year's experience the wife removed herself and child to the home of her aged grandfather, alleging ill-treatment by her husband and family. There is no proof of this; and the result of the slight evidence seems to be that there was nothing beyond a general unpleasantness, in which the husband sympathized with his family. In the wife's brief correspondence with her husband after her departure, her only complaint is that she is not mistress of the house. Her husband offers, with natural coolness, to take her back; which she refuses, unless he will furnish her a house of her own, even if it consists of no more than two rooms.

After the complainant had rested her case, Mr. Shinn expressed willingness to provide a home. The further hearing was suspended; but when the Vice-Chancellor examined the new dwelling he decided that such a barely furnished shanty was a mere subterfuge, in the case of a man with circumstances as comfortable as those of Mr. Shinn. So Mr. Shinn is to pay alimony.

The head-note reads: "1. Every wife is entitled to a home corresponding with the circumstances and condition of her husband, over which she shall be permitted to preside as such wife, and it is the duty of the husband to furnish such home.

"2. A house over which others have entire control, and in which the husband and wife reside as boarders simply, is not such home."

The second part of this is startling enough. The notion that every wife has a right to keep house is one of which the general recognition would work a revolution in the domestic history of the race. Its effect on life in New York city, for instance, is rather hard to conceive. However, there is less ground for panic than one thinks at first, for the Vice-Chancellor's words are less sweeping than those of the maker of the head-note. "The correspondence shows that all Mrs. Shinn desired was a home in which she could be mistress. This every wife is entitled to." Mr. Shinn, however, "insisted upon the condition that she must either come back to him and live with him as a boarder, in the home of another," or in the shanty above referred to. There is nothing here to show that a suite in a Fifth Avenue boarding-house, where the landlady was no relative of the husband, might not have been a home over which the wife could satisfactorily preside as mistress. Still, the language is absurd enough, and the court does not mention an authority in the whole case. Surely none could be found for the proposition that the single fact that the husband forced his wife to "live with him as a boarder in the house of another" is ground for separate maintenance. Very possibly there may be facts in the case making the decree justifiable; but the language of the court, and still more that of the maker of the head-note, needs revision.

RECENT CASES.

AGENCY — ASSAULT ON SEAMAN BY CAPTAIN. — The owners of a vessel are not liable, even under the maritime law, for a wilful and malicious assault by the captain of the vessel on a seaman who refuses to obey a command on the plea of sickness; since, in committing the assault, he exceeds his authority. His command does not extend over the persons of the seamen beyond the infliction of usual and necessary punishment in case of disobedience or infraction of rules. 14 N. Y. Supp. 125, and 15 N. Y. Supp. 976, reversed. Maynard, Finch, and O'Brien, JJ., *dissent*. *Gabrielson v. Waydell et al.*, 31 N. E. Rep. 969 (N. Y.).

AGENCY — CONFUSION OF GOODS — PRINCIPAL AS PREFERRED CREDITOR. — *Held*, reversing the decision of the lower court, that when money of A, the principal, is mingled with that of B, the fiduciary, and A cannot identify his property in some form, mere enrichment of B's estate does not entitle A to be made a preferred creditor. *Northern Dakota Elevator Co. v. Clark*, 53 N. W. R. 175 (N. D.).

The case and the language of the court seem wrong. For if A, who trusted, not to B's solvency, but to his honor, can prove the fund for distribution is larger because of B's misappropriation, there is no reason why the general creditors should get the benefit of it at A's expense. Cf. *Peak v. Ellicott*, 30 Kan. 156; *Harrison v. Smith*, 83 Mo. 210; *Bowers v. Evans*, 71 Wis. 133.

CARRIERS — LIABILITY AS WAREHOUSEMEN — PROXIMATE CAUSE. — Goods transported by defendant, a common carrier, were placed in its depot on arriving at their destination. The consignee inquired for them on the following day but was told they had not arrived. While in the depot they were destroyed by fire. *Held*, that the company was liable for the value of the goods, as it was owing to its negligence in not delivering them, when demanded, that they were there to be destroyed. *East Tennessee, V. & G. Ry. Co. v. Kelly*, 20 S. W. Rep. 312 (Tenn.).

Compare 54 N. Y. 500, and 13 Gray 481. The latter case, representing the weight of authority, held that the defendant was not liable on facts similar to the above.

CONSTITUTIONAL LAW — APPORTIONMENT OF STATE INTO LEGISLATIVE DISTRICTS. — The Constitution of New York provides that, on a legislative apportionment, "each senate district shall contain, as nearly as may be, an equal number of inhabitants, . . . and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senatorial district except such county shall be

equitably entitled to two or more senators;" and that "the members of the Assembly shall be apportioned among the several counties of the State by the Legislature, as nearly as may be, according to the number of their respective inhabitants." *Held*, that these provisions do not require a mathematical accuracy, but vest in the Legislature a discretion with which the courts cannot interfere, unless it is plainly and grossly abused. It must be recognized that some inequalities are unavoidable, because of the compromises necessary to legislative action. *Andrews and Finch, JJ., dissent. People ex rel. Carter v. Rice*, 31 N. E. Rep. 921 (N. Y.).

Compare the recent cases in Wisconsin and Michigan, in which a contrary result was reached. *State v. Cunningham*, 51 N. W. Rep. 724; *State ex. rel. Lamb v. Cunningham*, 53 N. W. Rep. 35; *Giddings v. Blacker*, 52 N. W. Rep. 944; *Supervisors of Houghton County v. Blacker*, 52 N. W. Rep. 950.

CONSTITUTIONAL LAW — POLICE POWER. — The Legislature of West Virginia passed an Act, called the "Scrip Act," prohibiting any corporation, company, firm, or person engaged in any trade or business from paying their workmen by drafts redeemable otherwise than in lawful money. The Legislature also passed the "Screen Act," which provided that all coal mined shall be weighed before passing through a screen, and that mining companies shall pay their workmen on this basis. *Held*, by an evenly divided court, affirming the judgment appealed from, that mining is a business of great public importance, which the State has taken under its general supervision. The Legislature has granted extraordinary privileges to mining companies, and it is competent for it also to regulate that business for the public welfare. The public welfare demands that laborers should not be defrauded. The "Screen Act" is constitutional because it was intended to prevent fraud in the manner of weighing coal. The "Scrip Act" is constitutional because it was intended to prevent workmen being compelled to take drafts on a store for goods which might be there given to them at exorbitant prices. As these Acts were reasonably intended to bring about a result which it was within the power of the Legislature to accomplish, they cannot be declared unconstitutional simply because the court deems them inexpedient. *Peel Split Coal Co. v. State*, 15 S. E. Rep. 1000 (W. Va.).

English and Brannon, JJ., *dissenting*, held that mining companies were on the same footing as private individuals, that the screen had been introduced in order to separate the worthless dust from the valuable blocks of coal, and to provide for payment before screening, was to compel the company to accept coal which was worthless: this was taking the company's property without compensation, and therefore the Act was unconstitutional. The "Scrip Act" was unconstitutional because it discriminated between persons engaged in business and those employing laborers for their own benefit.

CONSTITUTIONAL LAW — STATE JURISDICTION OVER PLACES CEDED TO THE UNITED STATES. — The State of New York ceded to the United States its jurisdiction over lands belonging to the United States and used for a navy-yard. The United States leased part of the land to the city of Brooklyn for a market, and the city subleased to the plaintiff. It was held that the State courts had jurisdiction of an action for trespass committed upon the land. *Barrett v. Palmer*, 31 N. E. Rep. 1017 (N. Y.).

State courts have no jurisdiction over places which the United States has purchased with the consent of the State Legislature for the erection of forts or other needful buildings. *Commonwealth v. Clary*, 8 Mass. 72. In *Chicago, etc. R. R. Co. v. McGlinn*, 114 U. S. 542, it was *held*, that where the United States had acquired land in any other way than by purchase with the consent of the State Legislature, its jurisdiction over parts not in use for government purposes was subject to such reservations as the State in its grant of jurisdiction chose to make. This case goes farther, and holds that though there is no express reservation of State jurisdiction, a cession by a State of its jurisdiction to the United States, over property which the United States already owns, reserves a concurrent jurisdiction in the State, at least until Congress provides for the exercise of federal jurisdiction there. It is submitted that this is without warrant of authority, and contrary to the natural meaning of the words of cession.

CONTRACT — DISSOLUTION OF CORPORATION — IMPOSSIBILITY OF PERFORMANCE. — Prior to the formation of a corporation by plaintiff and defendants, they entered into an independent agreement that defendants should have the management of the corporation, and should guarantee to plaintiff specified dividends on his stock for seven years. Five years after the formation of the corporation plaintiff procured a dissolution of the corporation by action in the name of the people, in which he was joined. *Held*, that the plaintiff might recover on the contract for dividends accruing after the dissolution of the corporation. *Lorillard v. Clyde*, 20 N. Y. Supp. 433.

Adopting the construction of the court, that defendant's promise was an absolute

one and did not depend on the continuance of the consideration, *i. e.*, his management of the business, the case is clear. The court, however, for the purposes of arguments admit the supposition that the action of the State in dissolving the corporation interfered with defendant's performance of his side of the contract, and say that even then the defendant is not released, as the impossibility of performance was brought about by an act of the State which was the direct result of his own misconduct. This point was not decided in the case of *People v. Globe Ins. Co.*, 91 N. Y. 174, but was suggested in the argument of plaintiff's counsel, and the remarks of the court in this case show the probability of the adoption of a general rule, that a corporation is not released from its contracts by a dissolution by act of the State, when such dissolution was brought about by its own acts of negligence or misconduct.

CORPORATIONS — POWER OF EQUITY TO WIND UP. — L, owning a majority of stock of a corporation, made himself director with two others who held stock in trust for him, and controlled the corporation for his own interest and profit. No dividend had been paid for seven years, and during this time the complainant stockholder had had three thousand dollars tied up in the corporation. Held, that equity had power to grant relief, to compel L to account, and to wind up the corporation. *Miner v. Belle Isle Ice Co.*, 43 N. W. R. 218 (Mich.).

CORPORATIONS — REORGANIZATION UNDER LAWS OF A FOREIGN STATE. — The trustees of a mining company incorporated in New York transferred all its property to a corporation organized at the time under the laws of California for the purpose of carrying on the business heretofore conducted by the New York company. The sole consideration for the conveyance was an agreement by the California company to pay the debts of the New York company and to issue to it certain shares of capital stock. The holders of a majority of the stock approved the transfer. Held, that the trustees must make restitution to the New York company; for, since a corporation cannot be destroyed by its own act, it cannot sell its property to a foreign corporation organized through its procurement for the express purpose of stepping into its shoes, taking its assets, and carrying on its business. *People v. Ballard*, 32 N. E. Rep. 54 (N. Y.).

CRIMINAL LAW — INSANITY — IRRESISTIBLE IMPULSE. — Defendant, indicted for murder, set up the defence of insanity. The judge in the lower court told the jury that, even though defendant knew the act was wrong, if his will power was so weakened by disease as to render him incapable of controlling his acts, he must be acquitted. This instruction was held erroneous in the upper court, on the ground that the only test of insanity is whether the defendant at the time of committing the act knew the difference between right and wrong, and knew that his act was wrong. *State v. Harrison*, 15 S. E. Rep. 982 (W. Va.).

The case adopts the English rule as settled by *McNaghten's Case*, 10 Cl. & F. 200, which has been followed in many jurisdictions in this country. For the opposite view, see a very able opinion of Somerville, J., in *Parsons v. State*, 81 Ala. 577.

The convenience of the rule laid down in the principal case as a test for the jury is apparent, as it obviates the necessity of considering the difficult question whether the "irresistible impulse" was the result of disease or not. But it is submitted that under this rule many persons may be held guilty who are impelled to do the act by a power which they cannot resist, who therefore are not responsible for their acts, and should be exempt from punishment. This position is taken by writers on insanity (see Encyc. Brit., article Insanity), and all medical authorities agree that there are many cases where the person understands perfectly the nature of his act, and yet is driven on by an impulse which he cannot control. 1 Bish. Crim. Law (7th ed.), § 387.

DAMAGES — MENTAL SUFFERING. — A telegram addressed to plaintiff was negligently delayed and delivered too late to enable him to be at the bed-side of a dying brother. *Seemle*, that plaintiff could not recover damages for the mental suffering occasioned thereby. *Chapman v. W. U. Tel. Co.*, 15 S. E. Rep. 901 (Ga.). See above p. 260.

ELECTIONS — REJECTED BALLOTS. — Ballots which have been rejected without the statement of the cause of rejection which the statute requires the officers of election to make, must still be counted in making up the whole number of ballots cast, in order to determine whether any candidate had a majority for a particular office, though there is nothing to show for whom they were cast, or whether they were cast for any candidate for that office. *State ex rel. Phelan v. Walsh*, 25 Atl. Rep. 1 (Conn.).

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — In an action upon a policy of insurance, the defendant introduced evidence tending to show that a dead body, found at a certain place, which plaintiff claimed was that of the insured, was in fact that of one W., and offered in evidence letters written

by W. to his family, in which he stated his intention of going to the place where the body was found. The evidence was excluded, and defendant excepted. *Held*, that such letters were competent evidence, not as proof that the writer actually went to a certain place, but that shortly before the time when, as other evidence tended to show, he did go, he had an intention so to do. Such letters were not competent as memoranda made in the course of business. *Mut. Life Ins. Co. v. Hillmon*, 12 Sup. Ct. Rep. 909.

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — On a trial for murder of a woman, the defence was that the deceased had committed suicide. The circumstances not being consistent with this theory, the testimony of a trance medium was offered, to the effect that deceased called upon her the day before her death, and stated that she was five months pregnant with child, and asked what she should do, and later in the interview said she was going to drown herself. The evidence was rejected. *Held*, that such evidence was admissible to show the state of mind of deceased, and was not too remote in time, as the conditions had not changed from the time of the declaration to the time of death so as to make the declaration inapplicable. *Commonwealth v. Felch*, 132 Mass. 22, *overruled*; *Commonwealth v. Trefethen*, 31 N. E. R. 966 (Mass.).

This decision and the one before, in two courts of such high authority would seem to establish this exception to the hearsay rule upon a sound and satisfactory basis.

INSURANCE — CONDITION AGAINST RE-INSURANCE. — Plaintiff insured in a company whose policy contained a condition avoiding it if the assured should obtain other insurance without the consent of the company; he subsequently took out a policy on the same property in another company. *Held*, that the fact that the second policy also contained a clause providing that the existence of other insurance should render it void, and that the insured failed to notify the second insurer of the existence of the first policy, will not render the first insurer liable on the theory that the second policy was wholly void, and hence not a violation of the condition in the first; since by obtaining a second policy valid on its face, without giving notice to the first insurer, the insured has defeated the purpose of the condition. *Replegle v. American Ins. Co.*, 31 N. E. Rep. 947 (Ind.).

This is contrary to the rule as laid down in 2 May on Insurance, § 365, and supported by cases there collected; but it is submitted that the decision of the present case is right on principle, as it is certainly within the purpose of the general rule against other insurance. If the property owner *thinks* the second policy is good, and intends it to be good, the danger of his burning his building to get the insurance is the same as if the policy were really good. The point is well discussed, and authorities collected, in *American Insurance Co. v. Replegle*, 114 Ind. 1.

INSURANCE — INSANITY OF ASSURED. — An insane person who sets fire to the property insured does not have such a wrongful design as to give the company a good defence to an action on the policy. *D'Autremont v. Fire Asso. of Phila.*, 20 N. Y. Supp. 344.

This case illustrates the New York doctrine as first put forth in *Breasted v. Farmers' Ins. Co.*, 4 Hill, 73. As the case is one of absolute dementia, there is no room for the discussion of the mental phenomena which frequently involve these cases in psychological difficulties.

MASTER AND SERVANT — OBEDIENCE TO ORDERS — ASSUMPTION OF RISK. — A seaman, who was subject by statute to imprisonment and forfeiture of wages for disobedience of orders, was commanded by his superior officer, while the ship was in port, to operate an uncovered winch. The jury found that the seaman knew that the winch could not be operated without risk of danger to himself; that he operated it because he knew disobedience would result in his punishment; that notwithstanding his exercise of reasonable care, he was injured because of the known defects of construction in the winch. *Held*, that whether the order to operate the uncovered winch was lawful or unlawful, the finding of the jury, that there was no negligence on the part of the seaman in obeying, will not be reversed on appeal; also, that the seaman can recover from the vessel-owners, in view of the peculiarly difficult position in which he was placed. *Eldridge v. Atlas Steamship Co.*, 32 N. E. Rep. 66 (N. Y.).

On the findings of the jury this decision must be regarded as sound, but the dissenting opinion is entitled to careful consideration, and it might be well to add to it an examination of the following cases: 18 Q. B. D. 685; 14 App. Cas. 179; 63 N. Y. 448; 2 Ex. Div. 384; 8 S. E. Rep. 311; 79 Me. 397; 9 Exch. 223; 9 Cush. 112; 43 Ia. 396; 3 M. & W. 1; 4 Metc. 49.

REAL PROPERTY — ADVERSE POSSESSION AGAINST THE PUBLIC. — In an action to enjoin defendants, officers of a town, from entering upon certain premises and tearing

down a building, plaintiff set up a title by adverse possession to the premises, which had formerly been used as a public street. *Held*, that no title against the public can be gained by adverse holding, but there must be such circumstances as to estop the public to claim title. *Crocker v. Collins*, 15 S. E. Rep. 95 (S. C.).

Although this is a dictum, it is a considered one, and will probably establish the law for South Carolina which has been cited for the opposite view (Dillon, Municipal Corp. 4th ed. 674); the court here treated the South Carolina law as in doubt. The doctrine of this case is held in Pennsylvania and three other States, but is contrary to the weight of American authority (Dillon, *loc. cit.*).

REAL PROPERTY — CONDEMNATION OF PRIVATE WAY FOR STREET — DAMAGES. — When a private way is taken as a public street, the owners of the fee are entitled to nominal damages only. *Village of Orleans v. Steyner*, 32 N. E. Rep. 9 (N. Y.).

The court say that, deducting from the value of the public easement taken the value of the private easement which already incumbered the property, the injury is only nominal. It might be urged that the easement of a private way is more easily released, and is not necessarily so extensive. It would not, for example, include the right to operate a horse-railroad. In *Buffalo v. Pratt*, 131 N. Y. 297, the same court has held that if the fee of an existing public street be taken, substantial damages may be awarded.

REAL PROPERTY — DESCENT — TRACING TITLE THROUGH NON-RESIDENT ALIEN. — Under an Act prohibiting non-resident aliens from holding lands by descent, devise, or purchase, a resident whose father is a non-resident alien cannot inherit from his resident paternal uncle, since he would derive his title mediately through his father, and not immediately from his uncle. *Furnes v. Mickleson*, 53 N. W. R. 416 (Iowa).

REAL PROPERTY — EASEMENT — DIVERSION OF PERCOLATING WATER. — A conveyed to B land to which there was appurtenant the right to take water from a spring on A's adjoining land. A maliciously dug a well and ditch close to the spring, and thereby so diverted the percolating water as to make the spring useless to B. *Held*, that B could have specific reparation, for A's land became servient to B's to the extent apparently needed to sustain the grant. In any event, malice was immaterial. *Paine v. Chandler*, 32 N. E. Rep. 18 (N. Y.).

This decision virtually overrules *Bliss v. Greeley*, 45 N. Y. 671, which holds that a grant of an easement to use a spring can create no greater rights than a conveyance in fee of the soil of the spring. *Tybe's Appeal*, 106 Penn. St. 626, and *Chesley v. King*, 74 Me. 164, which follow *Bliss v. Greeley*, are not cited.

REAL PROPERTY — ELECTRIC RAILWAYS — ADDITIONAL SERVITUDE. — The use of a street by an electric railway with overhead wires and poles is not an additional servitude for which abutting owners can demand compensation. *Dean v. Ann Arbor Street Ry. Co.*, 53 N. W. Rep. 396 (Mich.).

The decisions on this point are conflicting. The New York rule, as a practical question, seems more logical. See 4 Harvard Law Review, 245.

REAL PROPERTY — ELEVATED RAILROAD — DAMAGES. — The owner of property can recover as past damages the diminution in rental value caused by an elevated railroad, although the structure did not interfere with the use to which the property was actually put by the owner. *Woolsey v. New York El. R. Co.*, 31 N. E. Rep. 891 (N. Y.).

It is the general rule that for a permanent injury to real estate the rule of damages is the diminution in market value. Sedgwick on Damages, 8th ed., § 947. Its application in this particular case allows a man to recover where he actually suffered nothing. This is similar to those cases which allow a reversioner to recover substantial damages for injuries done while a tenant is in possession. *Shadwell v. Hutchinson*, 2 Barn. & Ad. 97; *Jesser v. Gifford*, 44 Burr. 214.

WILLS — CONSTRUCTION — MISTAKE — EXTRINSIC EVIDENCE. — Testatrix, showing in her will intention to dispose of all her property, said that she was "owner of" and devised to plaintiff "the S. E. $\frac{1}{4}$ of section 14, township 93, range 17," in a certain county. She did not own the S. E. $\frac{1}{4}$, but did own the S. W. $\frac{1}{4}$. In construing the will, *held*, that the expressed intention was clear, and exactly described land in existence, and that the court could not refer to extrinsic facts to show an intent not expressed, and that if the words "S. E." were ignored, there did not remain a sufficient description to identify the lot devised with the S. W. $\frac{1}{4}$. *Eckford v. Eckford*, 53 N. W. Rep. 344 (Iowa).

The case seems right, and is very fully discussed on the cases and on the principles laid down in Wigram on Wills. The court decline to follow cases holding bare words of ownership to be sufficient description to carry land actually owned.

REVIEWS.

A FORMULARY OF THE PAPAL PENITENTIARY IN THE THIRTEENTH CENTURY. Edited by Henry Charles Lea, LL.D. Philadelphia: Lea Brothers & Co., 1892. Pages xxxviii, 183.

In a legal periodical it is not possible to give Mr. Lea's latest work the notice which its importance in its own field deserves. Students of Church history, and particularly of the development of the system of ecclesiastical discipline still exercised from Rome over both laity and clergy, will look upon the documents comprised in this book very much as students of the history of the common law would look upon the discovery of a new set of year books earlier and more complete than any before known. Mr. Lea's name is a guaranty that the editing and annotations add very greatly to the value of the text. The same may be said of the preliminary sketch,—making, however, the usual deduction for Mr. Lea's invariable bias against the Church. His frame of mind is not quite judicial.

P. S. A.

THE OLD ENGLISH MANOR, A STUDY IN ENGLISH ECONOMIC HISTORY. By Charles McLean Andrews, Ph.D. One volume. Pages xi, 291. Baltimore: The Johns Hopkins Press, 1892.

The work before us is concerned chiefly with lay history. It essays to reconstruct the village and manorial system of England in the eleventh century. This should involve the legal conception of the system. And Mr. Andrews has given this side of the question due attention, while devoting his book mainly to its historical and economical aspects.

The attempt is not only to give in skeleton the theory of the manorial system, but also to describe in detail the manners and customs of the time. The latter purpose is illustrated by the following titles: Cap. IV., The Special Workers; Cap. V., The Yearly Routine of Work; Cap. VI. (a), The Farm and House Utensils, (b) Recreations. And to this end all Anglo-Saxon literature has been levied on.

But to some the most interesting feature of the work will be the Introduction, giving the history of the mark theory, and its modified shape of to-day. The writer draws attention to the waning faith in that historical and economic unit, the Saxon village community, being an instance of unmodified liberty and democracy; and, in general, asserts that the character of the mark and of its later development, the manor, will be settled as neither entirely free nor entirely servile.

The book is not of the so-called popular variety, but is closely written, scholarly, and, embodying much evidential matter, gives the results of thorough research. In style it is not winning. But for one who wishes to grasp the content of that shadowy term, "manor," it is to be highly recommended.

J. C.

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NO. 6.

WAIVER OF TORT.

II.

ASSUMING the existence of a case where the doctrine of waiver applies, the question arises, — if the tort has been committed by two or more persons, — as to the nature and extent of their liability : Are they jointly, severally, or jointly and severally liable? Must each answer *in solido*, or each only for the amount actually or constructively received by him?

In seeking an answer to these questions, it must be borne in mind that the object of the action is not to recover damages, but to make the defendant *disgorge*.¹ In *National Trust Co. v. Gleason*,² Rapallo, J., thus expressed the distinction : "To charge a party in an action of that character, the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds."

Although in England the liability in tort of two or more joint tort feors is held to be joint,³ while in this country the liability is joint and several,⁴ in all jurisdictions each tort feor is liable to make good the entire damage done, since the damage is traceable to him as a moving cause. If, however, a wrong-doer is not liable in quasi-contract unless he has received some part of

¹ 6 Harvard Law Review, 223, 224.

² 77 N. Y. 400.

³ *Brinsmead v. Harrison*, L. R. 7 C. P. 547.

⁴ *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180.

the plaintiff's property in the commission of the wrong, the extent of his liability would seem necessarily to be limited to that which he has received. This proposition, which is not disputed where the defendant is a sole tortfeasor, would seem also to determine the extent of the liability where there are joint tortfeasors. For if in the case of a sole tortfeasor the defendant is only liable in quasi-contract for that which he has received, on what principle can he be made liable in quasi-contract in the case of a joint tort for what has been received by another *for himself, and not for the defendant?* Of course it is not necessary that the property come into the physical possession of the defendant; it is sufficient if it has been received for him by another acting under his authority.¹ And the fact of his agent's having absconded would constitute no defence.² But where that which has in fact been received by another is received only in part for the defendant, and the action is not in tort, the tort, to use the language of Rapallo, J., in *National Trust Co. v. Gleason*,³ being "*only an item of evidence tending to establish his interest in the proceeds,*" it seems that on principle the extent of his interest in the property should be the limit of the recovery against him. If this view is correct, then his liability should be several, and not joint, or joint and several; for each obligation would depend upon questions differing in one particular, namely, the extent of the defendant's enrichment. Opposed to this view, however, both as to the liability being several and as to its extent, will be found *dicta* in *The National Trust Co. v. Gleason*,⁴ and in *The New York Guaranty and Indemnity Co. v. Gleason*,⁵ — *dicta* entitled, it must be admitted, to the weight of decisions, because of the consideration given to the question. And in accord with the *dicta* of these cases is the case of *Carew v. Rutherford*.⁶ In all of these cases, however, the argument of counsel seems to have been addressed rather to the fact of liability than to its extent.

In *City National Bank v. National State Bank*,⁷ the defendant sought to counter-claim against the plaintiff the sum of \$25,661, loaned by it to one Hardie, a former president of the plaintiff,

¹ *National Trust Co. v. Gleason*, 77 N. Y. 400 (*semble*); *Carew v. Rutherford*, 106 Mass. 1.

² *National Trust Co. v. Gleason*, 77 N. Y. 400 (*semble*); *New York Guaranty Co. v. Gleason*, 78 N. Y. 503 (*semble*).

³ 77 N. Y. 400.

⁴ 77 N. Y. 400.

⁵ 78 N. Y. 503.

⁶ 106 Mass. 1.

⁷ 32 Hun, 105.

under the following circumstances. Hardie being indebted to the plaintiff, the latter, although removing him from its management, allowed him to remain as a figure-head, in order that he might more easily get money with which to pay off his debt; and for that purpose it conspired to help him raise money on certain worthless securities. In this way he was enabled to borrow from the defendant \$25,661, \$13,000 of which was applied in payment of his debt to the plaintiff. The trial judge having refused to allow the counter-claim, on the ground that the liability was joint, and not several, a new trial was granted.

Davis, P. J., delivering the opinion of the court, said:—

"But it is insisted, in substance, that such an action on the implied promise would be on a joint and not several contract, and that for that reason, inasmuch as Hardie is not a party to the action as plaintiff or otherwise, the implied contract cannot be set up in this suit as a counter-claim. We think the implied contract in such case which arises upon waiver of an action for tort is joint and several, and not joint alone. Such was the nature of the tort, and each party could have been separately sued upon it; and the same reason extends to the implied contract. Either conspirator may be sued upon his implied promise, and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy."

It is perfectly clear that the plaintiff should have been held liable to the defendant to the extent of \$13,000, the amount which it actually received from Hardie. But it seems impossible in point of principle to support the decision so far as it holds the plaintiff liable for the entire amount received by Hardie from the defendant; nor can one reconcile it with the decision in *National Trust Co. v. Gleason*.¹ Hardie clearly did not borrow the money for the plaintiff, and was therefore not the plaintiff's agent. And while the plaintiff's assisting Hardie in defrauding the defendant would render the plaintiff liable, if sued in tort by the defendant, to make good the damage done by Hardie, it does not render it liable either severally or jointly to refund that which had not been received by it.

So far as the case holds that the liability is several, it should and would be followed. It does not result from this suggestion that the tortfeasor into whose possession the property is actually traced can reduce the amount of his liability by showing that he

¹ 6 Harvard Law Review, 269, 270.

has transferred the property in whole, or in part, to another for whom he always held the whole or a part of it. The moment it actually came into his possession, the obligation was imposed upon him of restoring it to the plaintiff; and that obligation he cannot escape by otherwise disposing of the property.

There remains to be considered the question of what amounts to a conclusive election, and the effect thereof. A person having the right to sue in quasi-contract or in tort may, by his conduct before action brought, lose one or both rights. Thus, for example, if one having the right to sue another for a conversion, demand and receive from the tortfeasor the money received from a sale of the property, he has of course, by the receipt of the money, extinguished the claim for money had and received; and since he should not have both the property and its proceeds, he can no longer sue in tort.¹ If, however, the money is taken, not as the proceeds of the property, but in diminution of damages, such a receipt will not be treated as an election. Unless, however, the facts warrant the inference that the money is received, not as the proceeds of the sale or transfer, but in mitigation of damages simply, then by such receipt the plaintiff precludes himself from suing in tort.² An unsatisfied demand will not preclude the plaintiff from electing between remedies. Thus in *Valpy v. Sanders*,³ the defendant bought goods from the servant of an absconding tradesman in circumstances rendering him guilty of a conversion as against the plaintiff, afterwards appointed assignee. The plaintiff sent an invoice of the goods to the defendant, demanding payment. The defendant refused to pay, claiming a set-off against the bankrupt. It was held that this demand did not prevent the plaintiff's suing in tort.

Assuming an unsatisfied demand not to preclude one from electing between the two rights, the question arises as to the effect of an action brought, but not prosecuted to judgment. In *Thompson v. Howard*,⁴ the defendant was sued in tort for enticing the plaintiff's minor son into his service. He pleaded in bar that he had been previously sued in assumpsit by the plaintiff seeking to recover the value of his son's services, the action being discontinued

¹ *Brewer v. Sparrow*, 7 B. & C. 310; *Smith v. Baker*, L. R. 8 C. P. 350.

² *Vernon v. Lythgoe*, 5 H. & N. 180; *Bradley v. Brigham*, 149 Mass. 141.

³ 5 C. B. 887. See also *Morris v. Robinson*, 3 B. & C. 196.

⁴ 31 Mich. 309.

after a disagreement of the jury. This was held a good plea in bar.

Graves, C. J., delivering the opinion of the court, said : —

“A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

“*As there was no evidence or claim that the parties ever actually agreed together at all in regard to the minor's services,*¹ it was not possible to refer the assumpsit to any real agreement of a date later than that of the defendant's supposed wrongful enticement, and not possible to infer that the assumpsit rested on a distinct arrangement, and left the original wrong as a ground for a separate suit.

“The first action extended to the minor's services from the beginning ; and, when the plaintiff brought it, he thereby virtually affirmed that his son was with defendant in virtue of a contract between the latter and himself, and not by means of conduct which was tortious against him.

“His proceeding necessarily implied that defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service against the plaintiff's assent.

“The case is, then, subject to the doctrine before stated, and the election involved in the first suit precluded the plaintiff from maintaining this action for the wrong.”

It is respectfully submitted that the doctrine invoked by the court had no application to the case under consideration. Indeed, the court, for the purpose of defeating the plaintiff, assumes as a fact what it knows and states to be not a fact, namely, the existence of a contract between the plaintiff and the defendant. Having shown that the plaintiff must have made the same state of facts the basis of both actions, since there was really no contract between the plaintiff and the defendant, the court then assumes the existence of a contract for the purpose of defeating the plaintiff in the action of tort.

The plaintiff in *Thompson v. Howard*, notwithstanding the discontinuance of his former action, could have brought another action in assumpsit. The defendant, therefore, is not in a position

¹ The italics are the writer's.

to avail himself of the rule of law expressed in the maxim : *Nemo debet bis vexari pro eadem causa* ; for there is no more double vexation involved in an action of assumpsit followed by an action in tort, than if the action of assumpsit were followed by another action in the same form. Nor does the court rest the decision on the ground of double vexation, but on the plaintiff's attempting to take contradictory positions. Its definition of a contradictory position is the use of remedies "so inconsistent that the assertion of one involves the negation or repudiation of the other." Now, a nonsuit in trover would not prevent trespass, nor would a nonsuit in account prevent debt. Why, then, should assumpsit preclude the bringing of tort? They are both personal actions and actions on the case, and according to the *dicta* of the early cases the bringing of the one if not prosecuted to judgment should not preclude one's resorting to the other.¹

The only possible way in which the one can be said to be "the negation or repudiation of the other" is to use, in order to deny a remedy, a fiction adopted solely to give a remedy.²

The most common illustration of the doctrine misapplied in *Thompson v. Howard* is the case where a party having a right to rescind a contract because of fraud, repudiates the contract and

¹ Holt, C. J., in *Lamine v. Dorrell*, 2 Ld. Ray. 1216; *Hitchins v. Campbell*, 2 Wm. Bl. 827.

² Of the cases cited by the court in *Thompson v. Howard*, none support the decision. In *Smith v. Hodson*, 4 T. R. 211, the court held that a party who sues on a contract which he might have disaffirmed, thereby enables the defendant to plead a set-off; though had the plaintiff sued in trover, he could not have so pleaded. And of the soundness of this decision there can be no question. In *Rodermund v. Clark*, 46 N. Y. 354, it was held that one who retains possession of a vessel, of which he was part owner, refusing to deliver it to one to whom the co-owner had sold the whole vessel, could not afterwards by suffering a judgment by default in favor of the purchaser, sue the co-owner as for a conversion; although had he suffered the purchaser to take the vessel at the time of the purchase under the bill of sale, he could have maintained the action. As the surrender of the possession by him was held essential to make the act of the co-owner effectual and tortious, it is clear that when he retained the possession and refused to deliver under the bill of sale, the force of the act done by the co-owner was spent, and no independent act of the plaintiff — such as suffering a judgment by default — could revive it. And while a *dictum* of Bovill, C. J., in *Smith v. Baker*, L. R. 8 C. P. 350, supports the decision in *Thompson v. Howard*, this is not at all true of the decision. It was simply held that one who had under an order of court received the proceeds of sale could not afterwards bring an action in trover because of such a sale. That is to say, as one is not entitled to both the property and its proceeds, he cannot recover the proceeds, and yet complain of the sale which produced the proceeds. In *Jewett v. Petit*, 4 Mich. 508, it was simply held that one cannot repudiate in part a compromise induced by fraud.

sues in tort, or, with full knowledge of the facts, sues on the contract. In such a case the assertion of the two rights would involve the plaintiff, in the language of the court in *Thompson v. Howard*, in "contradictory positions," the assertion of the one involving the negation or repudiation of the other. Since he must deny the validity of the contract to take advantage of the fraud, having sued for the fraud, he cannot afterwards treat the contract as unobjectionable;¹ and since he cannot sue on such a contract without affirming its validity, it is highly proper that he should not be allowed to blow hot and cold, and thereafter to treat the contract as invalid.²

But in cases of waiver of tort, instead of the tort disappearing when the action of assumpsit is brought, the action of assumpsit could not be maintained without proof of the tort.³ How then can one be said to occupy "contradictory positions," in which the assertion of the one involves the negation or repudiation of the other, when to recover in either action he must establish that the defendant is a tortfeasor?

Where an action is prosecuted to judgment, the rule, *Nemo debet bis vexari pro eadem causa*, of course applies, and all rights are merged therein.⁴ That this maxim may be invoked, the remedies must, however, have been co-existent.⁵ Thus in *Browning v. Bancroft* the defendant, who by fraudulent representations had obtained from the plaintiff certain goods, and who had sold part of them, pleaded, in bar to an action of replevin for the remainder, the fact that the plaintiff had recovered in an action for money had and received the proceeds of the goods sold. But the action of replevin was allowed; the remedies were not co-existent. Of course, if in the action for money had and received it had been decided that the defendant was not guilty of the fraud charged, that fact could have been pleaded in bar of the action of replevin, the question being *res adjudicata*.⁶

¹ *Moller v. Tuska*, 87 N. Y. 166.

² *Seavey v. Potter*, 121 Mass. 297; *Acer v. Hotchkiss*, 97 N. Y. 395.

³ *Huffman v. Hughlett*, 11 Lea, 549.

⁴ *Hitchin v. Campbell*, 2 Wm. Bl. 827; *Buckland v. Johnson*, 15 C. B. 145 (*semble*); *Bradley v. Brigham*, 149 Mass. 141; *Boots v. Ferguson*, 46 Hun, 129.

⁵ *Browning v. Bancroft*, 8 Met. 278.

⁶ *Hitchin v. Campbell*, 2 Wm. Bl. 827.

It has been assumed up to this time that the tort is waived either by the act of the injured party before action brought, or by the bringing of an action. The waiver may,

Thus far the effect of waiving the tort has been considered on the assumption of there being a sole tortfeasor. The question naturally arises as to the effect of the waiver in the case of joint tortfeasors. Suppose A and B join in the commission of a wrong: what effect has the waiver of tort as to A upon the right to sue B in tort? Or suppose A to be sued in tort: what effect has the failure to waive the tort as to A upon the right to sue B in *quasi-contract*? In *Buckland v. Johnson*¹ the plaintiff, having recovered a judgment in trover against one of two joint tortfeasors for a conversion of property by a wrongful sale, and being unable to realize upon the judgment, sued the defendant, the other tortfeasor, in a count for money had and received to recover the proceeds of the sale. The money arising from the sale was received by the defendant alone, and not by the tortfeasors jointly. It was held that the judgment in trover was a bar to this action.

The reasoning by which this conclusion was reached will be found in the following extract from the opinion of Jervis, C. J. :—

“The authorities show, and indeed it is not denied, that if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. . . . The whole fallacy of the plaintiff's argument arises from his losing sight of the fact that by the judgment in the action of trover the property in the goods was changed, by relation, from the time of the conversion, and that, consequently, the goods from that moment became the

however, be asserted by counter-claim or set-off. *Allen v. United States*, 17 Wall. 207; *Farnum v. Linsey*, 20 Kans. 235; *Challeis v. Wylie*, 35 Kan. 506; *Eversole v. Moore*, 3 Bush, 49; *Gordon v. Bunner*, 49 Mo. 570; *Andrews v. Artisans' Bank*, 26 N. Y. 298. See, however, *contra*, *Rickey v. Bly*, 115 Ind. 232; *Wood v. Ayres*, 39 Mich. 345.

In *Eversole v. Moore*, the defendant, being sued as administratrix, pleaded as a set-off the conversion by plaintiff of personal property of the intestate by the forcible taking thereof. The plea was sustained on demurrer. Robertson, J., delivering the opinion of the court, said: “And although tort cannot be set off against contract, yet the trespass in this case may be waived, and instead of suing for indeterminate damages arising *ex delicto*, an action *ex contractu* might be maintained for the value of the property converted on an implied promise to pay the value of it; consequently *indebitatus assumpsit* might be maintained for that value. And that which the appellant might have recovered in such an action, she may plead as a set-off in this case, as the demands of both parties arise from contract, express or implied, to pay a certain sum in money (*the value of property, not damage*). . . . And though the answer shows a tortious conversion, yet its election to demand only the value of the property waived the tort, and relied on implied contract, which might be enforced by *indebitatus assumpsit*.”

¹ 15 C. B. 145.

goods of Thomas Barber Johnson, and that when the now defendant received the proceeds of the sale, he received his son's money, the property in the goods being then in him."

In considering this decision it must be remembered that two of the premises from which the court drew its conclusions are not law in this country. The court assumed first that a judgment unsatisfied against one of two joint tort feorsors barred an action against the other. This is not true in the United States.¹ It was further taken for granted that by the judgment the title was vested in the defendant in the first action as of the time of the conversion. This does not represent the American law.²

If, then, the decision is to be followed here, it cannot be justified on either of the above assumptions.

It is true, as stated by the court, that a judgment in trover, though unsatisfied, bars an action against the same defendant for money had and received, assuming him to have sold the goods and to have received the proceeds. This is because no one should be subjected to double vexation. But as the doctrine of double vexation is not involved where a plaintiff having an unsatisfied judgment against one of two joint tort feorsors seeks to recover against the other, the two cases are not, as the court thought, analogous. Assuming, however, the correctness of the English doctrine that the liability in tort is joint, and not joint and several, it still seems impossible to support the conclusion reached in *Buckland v. Johnson*. The plaintiff recovered in the first action in tort, and not in the count for money had and received, because it appeared that the money had been received, not by the then defendant, but by the present defendant, whose liability in the count for money had and received was therefore several, and not joint; yet the court held this several liability to be barred by an unsatisfied judgment obtained against a third party. In *Floyd v. Browne*³ the same decision was reached.

In *Terry v. Munger*⁴ it was held that an unsatisfied judgment against one of two joint tort feorsors obtained on a count for goods sold and delivered could be pleaded in bar by the other tort feorsor when sued in trover for a wrongful conversion of the property.

¹ *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180.

² *Dow v. King*, 52 Ark. 282; *Atwater v. Tupper*, 45 Conn. 144; *United Society v. Underwood*, 11 Bush, 265.

³ *Rawle*, 121.

⁴ 121 N. Y. 161.

The following extracts from the opinion of Peckham, J., shows the line of reasoning adopted :—

"The contract implied is one to pay the value of the property *as if it had been sold*¹ to the wrong-doer by the owner. If the transaction is there held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer when the plaintiff elects so to treat it.

"The plaintiffs having by their former action in effect sold this very property, it must follow that at the time of this one, they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiff's recovering satisfaction in such action for the purchase price."

The writer has endeavored heretofore to show that the fiction of a promise invoked in the cases treated under this title was originally adopted simply for the purpose of pleading ; the action of assumpsit, which is in form, and originally always was in fact, based on a promise, being the only remedy open to the plaintiff seeking to enforce the quasi-contractual obligation, and that the real ground of liability is the fact that it would be unjust if the defendant were not compelled, at the option of the plaintiff, to pay for value received. And if such is the case, then the use of the fiction should cease with the necessity which gave rise to it ; and when used it should be recognized as a fiction, and treated as a fact only for the purpose for which it was invented. Having been adopted for the purpose of giving a remedy, under a system in which forms were paramount to substance it should not be used for the purpose of denying a remedy. And certainly its use for such a purpose cannot be justified in a jurisdiction, as in New York, where forms of action are no longer recognized, the substance being everything, and the form nothing. Now, every one knows that where one man tortiously takes the goods of another, there is no sale between those parties ; and yet the highest court in the State of New York gravely asserts that there was. In other words, a fiction to which it is no longer necessary to resort in New York in order to give a remedy, is there resorted to to deny a right. And the court says that there is no tort where but for the proof of a tort there could have been no recovery against any one. The decision will probably never be cited as illustrating the maxim, *In fictione juris subsistit equitas* ; and it is certainly at variance with Lord Mansfield's notions of fictions, who said, in *Morris v. Pugh*,²

¹ The italics are the writer's.

² 3 Burr. 1243.

"But fictions of law hold only in respect of *the ends and purposes for which they were invented*: when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

Opposed to *Terry v. Munger* is the decision in *Huffman v. Hughlett*.¹ This was an action brought to recover the value of lumber which had been converted by one Springer and sold by him to the defendant. The latter pleaded that the plaintiff had previously sued Springer to recover the value of the lumber; that by the bringing of that action in assumpsit (which had been discontinued) the original tort had been waived; and that as a consequence the lumber bought by the defendants was the property, not of the plaintiff, but of Springer. This claim was denied by the court. Cooper, J., delivering the opinion, said:—

"If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property.² It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrong-doer unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tortfeasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

It is respectfully submitted that this decision, which is sound common sense, not only violates no legal principle, but, on the contrary, is a striking illustration of the proper theory underlying the principle involved in the doctrine of waiver of tort generally, and relegates the fiction to its proper province.

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¹ 11 Lea, 549.

² *Kirkman v. Phillips*, 7 Heisk. 222, 224.

RESTRICTIONS UPON THE USE OF LAND.

IN a country like this, in which towns are built up so rapidly, it is important that it should be clearly understood what power the present owner of a piece of land has to restrict the mode of use of the land in the future.

Many years ago the courts thought it wise to declare it to be against public policy to permit any man to control the devolution of the title to land for a longer period than a life or lives in being and twenty-one years after ; but since that time courts of equity, by enforcing restrictive covenants as to the use of land, have permitted men to control, for an indefinite period after they are dead, the manner in which the land they owned in their lifetime might be used by succeeding generations.

Land now in the centre of the business part of London or New York is in some cases subject to restrictions placed upon it by men who, a hundred or three hundred years ago, thought best to lay it out for pleasure gardens or for building suburban residences. If the Duke of Bedford had not allowed his own land around Montagu House to be built upon, the land where the Elgin Marbles now stand in the British Museum might have been still restricted to the use of a gentleman's garden, as was provided in a deed to Mr. Montagu in 1685 ; and if Columbia College had not sold some of its lands on Sixth Avenue and Fiftieth Street for business purposes, a large tract in that neighborhood might still be of no use except for dwelling-houses.

There is a recent case in New Jersey¹ in which three acres of land near a populous village have been decreed to remain perpetually vacant, because the owner exacted a covenant from the purchaser that only one building, to be used for a dwelling-house with its appurtenances, should be erected on a plot of four acres, and the purchaser in an unguarded moment sold one acre on which the house provided for was afterwards built.

There has been a good deal of discussion during a few years past of the principles on which restrictive covenants are enforced against subsequent purchasers, and of the distinctions between covenants

¹ *Coudert v. Sayre*, 46 N. J. Eq. 386.

which bind only the parties and those which permanently affect the land of either party either by way of obligation or benefit. These principles and distinctions were the subject of a thoughtful article in this REVIEW in January, 1892, by Mr. Charles I. Giddings, and of another by Mr. Sherrerd Depue in the "American Law Register" for February, 1890. There is no need to go over again the ground so thoroughly worked in those discussions. Mr. Giddings, however, says: "The whole subject of restrictions is yet in its infancy;" and there is one part of it with respect to which he only suggests the principle to be applied in solving the questions that will arise. We refer to the questions which grow out of the sale of a plot of land with restrictions arising out of the adoption of a general scheme or plan for the improvement of the land. In such a case it is held that the purchaser of any lot has a right in equity to enforce the covenant against the purchaser of any other lot, even though there be no privity of estate or of contract between them, either directly or by assignment, express or implied. There have been some recent cases in England and in New Jersey on this branch of the subject. It may be interesting to refer to them and to consider how far the principles applied to the subject in general are sufficient to account for these decisions.

Mr. Giddings, in the beginning of his article, says: "A restriction may be defined as an agreement concerning the use of land by its owner which runs with the land in equity;" and Mr. Depue, in the title of his paper, calls the restrictions "equitable easements." Using the language of Bigelow, C. J., in a case in Massachusetts,¹ he defines an equitable easement as "A right, without profit, which the owner of land has acquired, by contract or estoppel, to restrict or regulate, for the benefit of his own property, the use and enjoyment of the land of another." Mr. Giddings rejects the analogy of easements, and insists that, as against the original covenantor, the remedy depends upon the doctrine of specific performance of a contract, and as against subsequent purchasers it depends on the doctrine of constructive trusts. As between the vendor and vendee who has agreed to the restrictions, if the agreement is one of which the court may decree specific performance, the court will enforce it by such a decree; and if the land has been sold to another with notice of the agreement, the court will enforce the agreement against him on the ground that he has taken the land subject to

¹ *Whitney v. Union Ry. Co.* (1858), 11 Gray (Mass.), 359.

the trust that was attached to it by his predecessor in the title. In either case this theory seems to imply that the remedy is given to the person with whom the contract was made, the person who has the right to ask for the specific performance of the agreements. If the existence of the right depends upon the right to specific performance, it would seem that it belonged only to the person to whom this right belonged.

The doctrine of specific performance would give the person with whom the contract was made a remedy against the person who made it, and the doctrine of constructive trusts would enable him to enforce it against a purchaser with notice ; but it is not clear how either doctrine would be sufficient to give a remedy to any one else than the person with whom the contract was made, or serve to explain the cases in which several purchasers of different parts of a tract of land may enforce restrictive covenants against one another.

The fact that the right and the burden are treated as following the land into the hands of the assigns of both parties seems to suggest that the analogy of the easement is a true one.

The result of a restrictive covenant between land-owners is treated as an easement by Mr. Goddard in his treatise on Easements ;¹ and in a recent case in Massachusetts,² cited by Mr. Depue in his article, the learned judge says : —

“If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement, — capable, that is to say, of being treated as a *jus in rem*, and not as merely the subject of a personal undertaking, — and if the deed discloses that the covenant is for the benefit of the adjoining land conveyed at the same time, the covenant must be construed as a grant, and, in the language of Plowden, 308, ‘the phrase of speech amounts to the effect to vest a present property in you.’ An easement ‘will be created and attached’ to the land conveyed, and will pass with it to assigns, whether mentioned in the grant or not.”

Chief-Justice Bigelow, however, in an earlier case in Massachusetts,³ placed the obligation on a purely equitable ground, and said : “An agreement restricting the use of land is binding on an assignee with notice, not because he is an assignee, but because he has taken the estate with notice of a valid agreement concerning it which he

¹ Goddard on Easements, p. 89.

² *Norcross v. James* (1885), 140 Mass. 188.

³ *Whitney v. Union Ry. Co.*, 11 Gray, 359.

cannot equitably refuse to perform." And Chief-Justice Beasley, in a leading case in New Jersey,¹ says: "The principle on which equity enforces the burden of a covenant against an alienee is that of preventing a party having acquired land with knowledge of the rights of another from defeating such rights, and not upon the idea that the engagements create easements which run with the land."

The idea of an equitable easement is certainly not sufficient to account for all the decisions, and, as Mr. Giddings points out, it involves an extension of the doctrine of easements to subjects to which they had never been applied by courts of law. The idea of a constructive trust seems to involve the holding of a title to the land for the benefit of another, and of an equitable title in the person for whose benefit it is held. It is something more than a restriction upon the manner in which the land may be used.

It would involve a discussion of all the cases from the beginning to determine what the governing principle really is. All we can attempt to do at this time is to consider the cases in which the principle has been applied to restrictions arising out of the adoption of a general plan for the use or improvement of the land, and to see in whose favor and against whom restrictive covenants in such cases may be enforced.

In these cases there are more parties involved than in the ordinary case of a covenant restricting the manner of use of a piece of land. All persons who purchase any part of the tract with reference to which the plan was made have an interest in having the restriction observed; a man who bought some years ago may have an interest in a covenant made with the purchaser who buys to-day, even though he cannot, of course, be in any way an assignee of the covenant; persons who made no agreement with one another are interested in enforcing a restriction that is common to all, and the original covenantee may have no interest in the contract which was made only with him. There is a new element in these cases which is not involved in the simpler case of a sale subject to a restrictive covenant. The question is not merely whether the land sold remains subject to the restriction in the hands of a purchaser, but also whether other lands sold, it may be before or afterwards, shall have the benefit and be subject to the burden of the restriction.

It is obvious that, in order to decide cases of this kind, it is not

¹ *Brewer v. Marshall* (1868), 19 N. J. Eq. 537.

enough to determine that the land in the hands of an assignee remains subject to the covenant made with the grantor. It may well be that the grantor has a right to enforce the covenant against an assignee of the land, and yet that no such right is acquired by a previous, or even a subsequent, purchaser of another part of the same land.

There is a long line of cases relating to restrictive covenants in which the only question is whether the person with whom such a covenant is made may enforce it against one who has taken the land with notice of the covenant; but there is nothing in these to suggest that any land other than that retained by the grantor shall have the benefit of the covenant. In these cases it will be found that the action is brought by the grantor or his assigns of the land retained, and the only question is whether the burden of the covenant runs with the land, or, to put it upon another principle, whether the purchaser with notice takes the land subject to the restriction. In the leading case of the *Duke of Bedford v. The Trustees of the British Museum*,¹ the injunction was asked for by the person with whom the covenant was made, and the question was whether it was binding upon the assigns of the person who made it, and if so, whether the former was not estopped by his own conduct from asking for an injunction. In *Kippell v. Bailey*² the suit was brought by the original grantor against a lessee of the grantee, and, not invoking the equitable principle afterwards applied, the court held that the covenant was not one which ran with the land, and was therefore not binding upon the assignees of the covenantor. In *Tulk v. Moxhay*,³ the suit was brought by the grantor against a purchaser from the grantee, and Lord Chancellor Cottenham said: "The question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." The necessity for a covenant running with the land was rejected, and the equitable doctrine of notice was adopted; but the benefit was given to the person with whom the contract was made. In *Clements v. Welles*⁴ the suit was brought by a lessor against an under-lessee upon a covenant not to carry on a particular trade. In *Wilson v. Hart*⁵ the suit was brought by the grantor against a purchaser from the grantee on a

¹ 2 M. & K. 552 (1822).

² 2 Phil. 774 (1848).

³ 1 Ch. App. 463.

⁴ 2 M. & K. 517 (1834).

⁵ L. R. 1 Eq. 199 (1865).

covenant not to use a house for the sale of beer, and the covenant was held to be personal, and not binding on the purchaser. In *Cooke v. Chilcott*¹ the bill was filed by the grantor against an alienee of the grantee to enforce a covenant to furnish a supply of water from a well. In *McLean v. McKay*,² there was a covenant between two that land should be left open, and the suit was brought by one against the alienee of the other. *Richards v. Revitt*³ was a suit by a grantor against an assignee of the grantee with notice. *Dietrichsen v. Cabburn*⁴ was a case of a negative covenant relating to personal property and the sale of patent medicines, and the complainant was the person with whom the covenant was made. In *De Mattos v. Gibson*,⁵ the rule that a purchaser with notice of a contract relating to the use of property is bound by the contract, was applied to personal property, and the obligation was spoken of as an obligation to the person with whom the contract is made. So also *Brewer v. Marshall*,⁶ the leading case in New Jersey, was a suit by a grantee of the covenantee against the vendor, on a covenant not to take and sell marl from the land he retained; and it was held that the covenant did not run with the land, and that the grantee was not entitled to the benefit of it. In *Kirkpatrick v. Peshine*,⁷ the covenant sued on was made with the grantor by the grantors of the defendant who took with notice, and it was expressly agreed that neither the said grantors nor their assigns should erect any building beyond a certain line. The Chancellor said the covenant was made by the grantor for the benefit of the land which he retained, and that a *subsequent* grantee of those lands succeeded to his rights under the covenant. *Whitney v. Union Railway Co.*⁸ is a case frequently cited in favor of the doctrine that a suit may be maintained in favor of any grantee of any part of the land; but it was only decided in that case that the original grantor might enforce the covenant against subsequent purchasers, and the rule, as stated, applied only to subsequent grantees of either. In *Trustees of Columbia College v. Lynch*⁹ there were reciprocal covenants between the owners of adjoining tracts, binding themselves, their heirs and assigns, and it was held that one of the parties might maintain a bill for injunction against a grantee of the other; and the relation of the parties was the same in Trus-

¹ L. R. 3 Ch. Div. 694.⁴ 2 Phil. 52.⁷ 24 N. J. Eq. 206.² L. R. 5 P. C. App. 327 (1873).⁵ De G. & J. 276.⁸ 11 Gray, 359 (1858).³ L. R. 7 Ch. Div. 224 (1877).⁶ 19 N. J. Eq. 537.⁹ 70 N. Y. 440 (1877).

tees of *Columbia College v. Thacher*,¹ in which the court refused relief because the circumstances had been so changed that the plan could not be carried out on both sides.

In all these cases the action was brought by the original covenantee, and the question was whether the restriction was binding upon a subsequent purchaser from the covenantor; and it was decided that such a covenant, touching the use of the land and purely restrictive in its character, would be enforced in equity against a subsequent purchaser with notice.

There are other cases in which the benefit of the principle is extended to subsequent grantees of the land for the benefit of which the covenant was made. It is easy to find a principle upon which a subsequent grantee may have the benefit of the covenant. If the covenant is one "touching and concerning the land," the benefit of the covenant runs with the land at common law, and the assignee of the freehold is entitled to sue for the breach of it.² Following the analogy of this rule of law, the Court of Chancery will enforce restrictive covenants or agreements in favor of a subsequent assignee of the land for the benefit of which the covenant was made.

It is not necessary to cite many cases on this point. In *Coudert v. Sayre*,³ Vice-Chancellor Van Fleet, in declining to annul a restrictive covenant which change of circumstances had made very burdensome, said the covenant was made by the grantor for the benefit of the land that he retained, and a subsequent purchaser of that land succeeded to his rights under the covenant. And in *Peck v. Conway*,⁴ where the action was brought by the subsequent grantee of a part of the lands retained, the court said that under the circumstances the covenant created an easement, or a servitude in the nature of an easement, for the benefit of the land retained, which passed to the grantee of that land.

It is not always true, however, that a grantee of the land retained has the right to enforce a restrictive covenant made by his grantor upon the sale of another part of the same land. The restrictive covenant may have been made for the personal benefit of the grantor, or it may have been made for the benefit of a particular piece of the land he retains. The mere fact that he is the owner of

¹ 87 N. Y. 311 (1871).

² *Spencer's Case*, 3 Coke, 16, and the notes on this case in *Smith's Leading Cases*, * 68, 87, 175.

³ 46 N. J. Eq. 386.

⁴ 119 Mass. 546.

a tract of land of which he sells a part does not give the whole of that land the benefit of the covenant, so that the purchaser of any part of the land retained will be able to enforce it. If the covenant creates a legal easement in favor of the land the grantor retains, then the easement will go to the assigns of any part of the land, and the same will be true if the covenant is one which runs with the land at law. In either of these cases the legal right may be enforced by a court of equity; but if there is not a legal easement nor a covenant running with the land at law, then the question whether the subsequent grantee of a part of the land can have an injunction will depend on whether the restriction was intended to inure to the benefit of a purchaser of the land now sold. If it is, then, if it be a mere restrictive covenant, and the existence of it entered into the consideration of the sale to him, he may have the benefit of it in equity just as if it were an easement or a covenant running with the land at law.

In *Keates v. Lyon*¹ the owner of a tract of land sold one part of it, subject to a covenant on the part of the purchaser, his heirs and assigns, with the vendor and his executors and administrators, as to the buildings to be erected on the property purchased. He afterwards conveyed other parts of the same tract to various other persons, but it did not appear whether these conveyances contained the covenant or not. He afterwards bought back the lot first sold; and the question was whether he could then convey it free of the covenants. The court held that, without evidence that the subsequent purchasers bought with reference to the covenant, the benefit of it did not pass to them, and that the lot first sold might now be conveyed free of the covenant. In *Master v. Hansard*,² where a man had leased two parcels of his land subject to the same restrictive covenants, it was held that an assignee of the second lessee could not maintain a bill to restrain an assignee of the first lessee from violating the covenant, and the landlord from permitting him to do so. It was insisted that, as the landlord had a right to enforce the covenant, he should not be permitted to derogate from his own grant by permitting it to be violated; but the judges said that it would be extending this doctrine too far to compel him to take active measures to enforce the covenants he had made with another, and Lord Bramwell remarked that he considered the covenant as made for the benefit of the grantor's remaining property to allow him to

¹ L. R. 4 Ch. App. 218 (1869).

² 4 Ch. Div. 718 (1876).

make the most of it, and that the plaintiff was not entitled to the benefit of it. So also in *Renals v. Cowlshaw*,¹ where land was sold subject to restrictive covenants, with reference to the location and character of the buildings, and other parts were sold subject to the same covenants, and still another part was sold to the plaintiff subject to a somewhat different covenant, it was held that the plaintiff was not entitled to the benefit of the covenant. If it had appeared, the court said, that the deed contained references to the restrictive covenants already made by others, or it was shown in some other way that the covenants were a part of the subject-matter of the sale, the grantee might have the benefit of them ; but the mere fact that he was a grantee of part of the remaining land gave him no such right. The covenant might have been inserted, as it appeared to have been in this case, merely to enable the vendor to make the most of the property he retained. This decision was affirmed on appeal,² and was cited with approval in a later case in the House of Lords.³

It appears, therefore, that the mere sale of land subject to a restrictive covenant, while it creates a liability in equity against a subsequent purchaser of the land with notice, gives a remedy only to the original vendor or covenantee, and also under certain conditions to a subsequent purchaser from him of the whole or a part of the land retained. There is nothing in these cases to give a right to a prior purchaser from the vendor, nor to create a liability to one another of all the holders of any part of the land to which the restriction might apply. The principles on which these cases are decided do not go far enough to give a remedy to all the proprietors of a tract divided into lots and sold subject to restrictions in which the sales were made. The covenant, under the principle of these cases, would give a remedy only to those who had purchased of the grantor after the covenant sued on was made. A prior purchaser cannot be the assignee of a covenant not yet made by his grantor. He cannot acquire an easement not yet created, and if the vendor, having sold to him subject to a restriction, is at liberty to sell his remaining land as he pleases, then the prior purchaser has no interest in a covenant which afterwards happens to be made. The right of the prior purchaser must depend upon something else than the covenant itself. There must be some other agreement, express or implied, to give to purchasers generally a right to en-

¹ L. R. 9 Ch. Div. 125 (1878).

² L. R. 11 Ch. Div. 866 (1879).

³ *Spicer v. Martin*, L. R. 14 App. Cas. 12 (1888).

force restrictive covenants against one another without regard to the order of the conveyance.

Mr. Giddings, in his article in the *HARVARD LAW REVIEW*, suggests that the grantor can donate to the prior purchaser the benefit of the contract made upon a subsequent sale, because, he says, there is never any objection to making a contract for the benefit of another, and a restriction is only a contract. The donation, however, must be implied to support the theory; and even though there may be no objection to making a contract for the benefit of another, it by no means follows that the person for whose benefit a contract is made may maintain an action upon it either at law or in equity. It is well settled in England that a person not a party to a contract, that is, a person other than the one from whom the consideration moves, cannot maintain an action upon it at law;¹ and although it has been said in many cases in the United States that a person for whose benefit a contract is made may sue upon it, yet upon a careful examination it will be found that they are nearly all cases of money had and received, or cases in which an implied contract has arisen from the receipt of money from one person for the benefit of another, or those in which there has been something like a novation of contract.² At all events, the doctrine had never been so much as suggested in England when the first cases on restrictive covenants on the sale of land to several purchasers were decided, and the decisions must rest on some other ground.

There is a large class of cases in which it has been held that where lands are sold in parcels subject to a restrictive covenant or agreement, the purchaser of one lot may maintain a bill in equity to enforce the restriction against the purchaser of any other lot, and this without regard to the order of the purchases and without joining the original covenantee. It will be found on examination that these are all cases in which the land has been laid out and sold with reference to some general plan or scheme for the improvement of the whole property, and the various grantees have purchased with express or implied notice of this plan. It is the better opinion that as between the original vendor and the assigns of the vendee, the covenant is enforced on the principle that a person taking the land with notice of the covenant with respect to its

Tweddle v. Atkinson, 1 B. & S. 393.

² See *Joslin v. N. J. Car Spring Co.*, 36 N. J. L. 141; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Mellen v. Whipple*, 1 Gray, 317; *Leake on Contracts*, 222; *Article on Contracts for the Benefit of a Third Person*, 4 N. J. L. J. 197 and 229.

use is bound in equity to observe the restrictions. The benefit of this is extended to subsequent purchasers of land for the benefit of which the restrictions were imposed, and they also take subject to the burden of them because of the added value given to their land by reason of the restriction upon the use of the other. When, therefore, there is a general scheme or plan for the improvement of the whole tract, it is the plan itself which is the subject of the notice, and which gives the added value to every part of the tract. Every one, therefore, who, with notice of the plan, takes any part of the tract to which it applies, takes subject to an obligation in equity to observe the restrictions imposed for the purpose of carrying the plan into effect for the common benefit; and since all the purchasers are interested in maintaining the scheme, the court of equity will aid any one of them in preventing any of the others from defeating it. One of the first cases in which relief was granted on the principle of carrying out a general plan was *Whatman v. Gibson*,¹ decided in England as early as 1838. In this case the owner of a piece of land divided it into lots for the building of a row of houses in a "crescent," according to a certain plan. A deed of covenant was made between the owner and two purchasers of lots and such others as should come in and sign the deed. The indenture referred to the plan and expressly declared that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row that the several proprietors for the time being should observe and abide by the stipulations and restrictions. The owner afterwards sold two other lots, and the purchasers signed the indenture and conveyed the lots, which afterwards came to the plaintiff and defendant respectively with at least constructive notice of the restrictions. Vice-Chancellor Shadwell, referring to the indenture, said it seemed to him that the matter was to be considered in equity not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed; namely, that it had been determined and made an indispensable condition of the sale of all and every part of the property that the several proprietors should observe the stipulations. It was quite clear, he said, that all the parties who executed the deed were bound by it, and he "saw no reason why, there being an agreement, all persons who came in

¹ 9 Sim. 196.

with notice should not be bound by it, each proprietor being manifestly interested in preserving the general uniformity and respectability of the row." It was notice of the plan rather than the covenant that created the equitable obligation which the court enforced in this case.

There is no need to state the subsequent cases in detail. Some of them are referred to in *Renals v. Cowlshaw*,¹ where the result is summed up by Vice-Chancellor Hall as follows : —

"From the cases of *Mann v. Stephens*,² *Western v. MacDermott*,³ and *Coles v. Sims*,⁴ it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that the right — that is, the benefit — of the covenant inures to the assign of the first purchaser; in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into by his vendor with another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase."

This opinion was adopted in the same case in the Court of Appeals,⁵ and was approved by the House of Lords in *Spicer v. Martin*.⁶

This statement of the law, deducible from these cases, is true as far as it goes; but it does not explain all the decisions, nor can it be said to be the statement of the principle underlying the cases in which the remedy is given to any purchaser against all the others. It assumes that the plaintiff is the assign of the covenant made by the defendant with his vendor, whereas in fact the plaintiff may have purchased before the covenant was made.

The idea that where there is a building scheme or a general plan the order of the conveyances is of no consequence, was suggested by counsel in *Sheppard v. Gilmore*.⁷ Pearson, Q. C., distinguished *Western v. MacDermott* on the ground that the conveyance to the

¹ 9 Ch. Div. 125.

² L. R. 2 Ch. 72.

³ 11 Ch. Div. 866 (1878).

⁴ 15 Sim. 377.

⁵ 5 De G. M. & G. 1.

⁶ 14 App. Cas. 12 (1888).

⁷ 57 L. J. N. S. Ch. Div. 6; 57 L. T. 614 (1887).

plaintiff in that case was subsequent to the conveyance to the defendant; and Hastings, Q. C., in reply, said: "The judgment in *Western v. MacDermott* was founded on the existence of a building scheme, and it was so regarded in *Keates v. Lyon*. Where a building scheme is established, the order of conveyance is immaterial." Stirling, J., in deciding the case, said it did not appear in what mode the Lord Chancellor reached his conclusion in *Western v. MacDermott*; and that whether the covenant could be enforced by one purchaser as against another, depended on whether it was made for the benefit of the land or of the vendor; and he held that the plaintiff had failed in his proof on this point.

In *Nottingham Patent Brick & Tile Co. v. Butler*,¹ Wills, J., says:—

"The principle which appears to me to be deducible from the cases is, that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit."

See also the recent decision of Mr. Justice Stirling in *In re The Birmingham and District Land Company and Allday*,² and the observations of court and counsel in *Remington v. Everett*.³

The idea of a general law and of the agreement being made for the common benefit was clearly brought out shortly afterwards in *Spicer v. Martin* in the House of Lords. In that case the plaintiff was a prior lessee; but the suit was brought to prevent the lessor from permitting a subsequent lessee from using the premises in violation of the covenant. There was evidence not only of a covenant with the plaintiff, but also of the existence of a building scheme and of references to similar covenants in other leases. It was held that the transaction showed a general plan for the com-

¹ 15 Q. B. D. 261, at p. 268; affirmed on appeal, 16 Q. B. D. 778.

² 27 Notes of Cases, 147.

³ [1892] 1 Ch. 148.

mon benefit of all, that all had an interest in maintaining the restriction, and that the defendant, having invited the public to come in and take a portion of an estate which was bound by one general law, — a law perfectly well understood and for the common benefit, — could not destroy the value of the property by authorizing the use of a part of the estate for a purpose inconsistent with the rule by which he professed to bind the whole. An injunction against using the property for trade was sustained (affirming *Martin v. Spicer*, 34 Ch. D. 1).

In *Mackenzie v. Childers*,¹ trustees offered an estate for sale by auction in plots, according to a plan referred to in a deed which was to be executed by the vendors and each of the purchasers. The deed imposed restrictions on the land sold, and contained a recital that it was intended to be a part of all future contracts that the several purchasers should execute the deed and be bound by the stipulations. It was held that there was to be implied from the whole transaction, and from the express assurance that all sales were to be made upon the same conditions, a covenant that the trustees would not permit the unsold property to be used in a manner inconsistent with the plan, and that the plan having been followed for twenty years, an injunction should issue to restrain the trustees from authorizing any purchaser to build contrary to the building scheme. *Renals v. Cowlshaw* and *Spicer v. Martin* were quoted and approved. The liability of the trustees was based on the existence of a general plan or scheme; and this was declared to be the foundation of the liability of one purchaser to another.

Turning now to American cases, we find a series of decisions in Massachusetts in which a general plan for the common benefit is made the basis of the reciprocal liability. The leading case is *Parker v. Nightingale*.² The heirs of an estate, owning several adjoining pieces of land in Boston, laid them out in house-lots around a court, and agreed orally among themselves that they should be used exclusively for dwelling-houses, and accordingly gave deeds containing a condition that no building should be erected except for use as a dwelling-house. It was held that the owner of one lot might maintain a bill in equity against the owner and the tenant of another to prevent the perversion of a dwelling-house into a public eating-house. The court said the owners, having united in a scheme or joint enterprise for the division of the estate into lots on

¹ 43 Ch. Div. 265.

² 6 Allen, 341 (1863).

a street laid out by them, and having annexed to the conveyance of each lot a restrictive use similar to that of every other, the legal inference, in the absence of evidence to the contrary, is that the intention was to secure to each estate the benefit of the restrictions; and the effect is to confer on each owner a right in the nature of an easement or servitude in all the lots on the same street, or which were conveyed subject to the same restriction. The earlier case of *Whitney v. Union Ry. Co.*,¹ often cited as authority for the proposition that any purchaser may maintain a bill against any other, was only the ordinary case of a bill filed by the original covenantee against the assigns of the covenantor. In *Linzee v. Mixer*² both parties claimed under contemporaneous deeds from the Commonwealth of lots on the Back Bay in Boston, all of which were sold subject to restrictions as to the location of the houses, these restrictions having been publicly advertised as a part of the plan for the improvement of the property. It was held that a bill for injunction would lie. On the other hand, in *Dana v. Wentworth*,³ it was held that the grantor could not maintain an action against one purchaser for the benefit of others, because there was nothing in the case to show that the restrictions in the deed were a part of a general plan for the benefit of the land conveyed and other estates on the same street. In *Tobey v. Moore*⁴ there was evidence tending to show a general scheme of improvement, and Gray, J., said that the deed under which both parties claimed, "by applying the same restrictions to many lots on various streets, supplied the evidence (which was wanting in *Dana v. Wentworth*) of a general scheme for the improvement and benefit of all the lands included in a large tract, which a grantee of any part of the land may enforce against his neighbor." In *Beals v. Case*⁵ one purchaser was not allowed to have an injunction against another to enforce the covenant contained in both their deeds that the building should not in any event be used as a stable. It appeared that the grantor had intended to except private stables, and that in other deeds the covenant contained that exception; and the court said one purchaser has a remedy against another, "But it is always a question of the intention of the parties; and, in order to make this rule applicable, it must appear from the terms of the grant or from the surrounding circumstances that it was the intention of the grantor in inserting

¹ 11 Gray, 359 (1858).

² 111 Mass. 291 (1873).

138 Mass. 138 (1884).

³ 101 Mass. 512.

⁴ 130 Mass. 448 (1881).

the restriction to create a servitude or right which should inure to the benefit of the plaintiff's land, and should be annexed to it as an appurtenance." In *Payson v. Burnham*¹ there were mutual covenants between the owners of the Mill-Dam and the adjoining flats in Boston with reference to the location of houses, and the grantee of one party was allowed to maintain a bill against the grantee of another to restrain the erection of a bay window. In *Hamlen v. Werner*² it was shown that the restrictions were inserted in pursuance of a general plan for building upon all the lots for the improvement of the neighborhood and for the benefit of all purchasers; and it was held that one who derived title from the vendor after the conveyance under which the defendant claimed might maintain a bill to enforce the covenant contained in the defendant's deed.

In these cases in Massachusetts the general plan, and not the covenant itself, is made the basis of the liability; and yet the court, in some of the cases, at least, considers the obligation as a sort of easement appurtenant to the land, instead of an equitable obligation arising out of the purchase of the property with notice of the purpose to which it has been devoted. The well-known *Columbia College* cases³ in New York suggest that relief is granted upon the theory that there is an easement upon the land of a grantee in favor of the land of any other; but in these cases also there is the general plan in an agreement between the owners of two tracts of land to devote their lands to a certain purpose, and to exclude all other uses.

It would take too long to follow down the lines of cases in other States, nor is it worth while in a discussion of this kind, on a subject on which so much has been written, to attempt to refer to the cases in the various States. There is a recent decision in New Jersey in which the question arose whether a prior purchaser could maintain a bill against a later purchaser to restrain the violation of a covenant contained in both their deeds. There was evidence of a general plan or purpose in the laying out of the land and imposing restrictions upon the purchasers.⁴

Vice-Chancellor Green, after reviewing the cases, said:—

"The right of the owner of a lot of land to enforce a covenant restrictive of the use of another tract, which covenant has been entered

¹ 141 Mass. 547 (1886).

² 144 Mass. 396 (1887).

³ *Trustees of Columbia College v. Lynch*, 70 N. Y. 440 (1877); *Trustees v. Thacher*, 87 N. Y. 311 (1881).

⁴ *De Gray v. Monmouth Beach Club House Co.*, 24 Atl. Rep. 388 (1892).

into by an owner of such other tract with the former owner of both, but has not been expressly assigned, depends primarily upon the covenant having been made for the benefit of land embracing said lot. If it has been so made, the benefit of the covenant inures to subsequent purchasers of the land: *Coudert v. Sayre*, *Mann v. Stephens*, *Western v. MacDermott*. [This rule, however, he says,] gives no right of action to a prior against a subsequent purchaser, and some other reason must exist for that class of cases which hold that purchasers and their assigns are entitled to enforce as between themselves a restrictive covenant entered into by first purchasers with a common vendor without reference to priority of title. . . .

"The class of cases in which equity has given such relief embraces those involving restrictive covenants entered into with the original owner or owners of a tract, in pursuance of a general plan for the development and improvement of the property, by laying it out in streets, avenues, and lots, adopting some uniform or settled building scheme, regulating the number, location, size or style of houses, or the uses to which the buildings or property may be put.

"The action is held not to be maintainable between purchasers not parties to the original covenant in cases in which, —

"1. It does not appear that the covenant was entered into to carry out some general scheme or plan for the improvement or development of the property which the act of defendant disregards in some particular. *Sheppard v. Gilmore*, 57 L. J. Rep. N. S. Ch. 6; *Dana v. Wentworth*, 111 Mass. 391; *Beals v. Case*, 138 Mass. 140.

"2. It does not appear that the covenant was entered into for the benefit of the land of which complainant has become the owner. *Sharp v. Ropes*, 110 Mass. 381; *Keates v. Lyon*, L. R. 4 Ch. App. 418; *Jewell v. Lee*, 14 Allen, 145; *Renals v. Cowlshaw*, 11 Ch. D. 866.

"3. It appears that the covenant was not entered into for the benefit of subsequent purchasers, but only for the benefit of the original covenantee and his next of kin. *Master v. Hansard*, 4 Ch. D. 718. See *Nottingham Brick Co. v. Butler*, 15 Q. B. D. 261; *Collins v. Castle*, 36 Ch. D. 243; *Renals v. Cowlshaw*, 9 Ch. D. 125.

"4. It appears that the covenant has not entered into the consideration of the complainant's purchase. *Renals v. Cowlshaw*, 9 Ch. Div. 125, s. c. 11 Ch. Div. 866; *Master v. Hansard*, *supra*; *Keates v. Lyon*, *supra*.

"5. It appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and to thus render its enforcement unreasonable. *Duke of Bedford v. Trustees*, 2 Myl. & K. 552; *Sayers v. Collyer*, 28 Ch. D. 103; *Trustees v. Thacher*, 87 N. Y. 311; *Ammerman v. Deane*, N. Y. Ct. App. 30 N. E. Rep. 741; *Page v. Murray*, 46 N. J. Eq. 325; *Roper v. Williams*, Turn. & R. 18; *Peek v. Matthews*, L. R. 3 Eq. 515. See *German v. Chapman*, 7 Ch. D. 271."

Quoting the cases we have already cited, the Vice-Chancellor says :—

“The law deducible from these principles and the authorities applicable to this case is, that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser ; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to, and to have the benefit thereof ; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, — one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.

“The right of action from this would seem to be dependent as much on the fact of the general scheme as on the covenant, — a very important consideration in a case in which the question arises whether certain threatened acts are in violation of the covenant, if any ambiguity exists as to its scope and meaning.”

This, we think, will be found to be a true statement of the law relating to this subject, and one which sums up the results to be gathered from the previous cases. It calls attention to the fact that the principle of assignment of covenant is not applicable to prior purchases, and shows that it is only in cases where there is a general plan that the rights and liabilities are conferred upon all purchasers alike. The decision also shows that the right of action is based upon the agreement expressed or implied in the plan rather than upon the covenants in the deeds, and makes the nature and purpose of the scheme important in determining the meaning of the contract.

The idea of a general plan will also throw light upon the question whether when a man has sold a number of lots subject to restrictions he is at liberty to sell others without restrictions, or to use the remainder of the property himself in a manner inconsistent with the restrictions. Supposing the vendor to make no covenant with respect to the land he retains, is he free to use that as he pleases while all the land he sells is subject to restrictions? Have the various purchasers a remedy against one another, and none against the vendor? If the vendor has a right as against previous purchasers to sell a lot free of restrictions, how is it that

if he sell it subject to restrictions the previous purchaser acquires a right to enforce the covenant? And if there is such a right against a purchaser, why not against the vendor? It is not as easy to answer all these questions as to ask them; but it would seem that in the absence of an express contract the obligation of the vendor, as well as that of the purchasers, depends on the existence of a general plan made known to purchasers, and entering into the consideration of the purchases. It is certainly not true that the mere sale of lots subject to restrictions binds the vendor to keep or convey the remaining lots subject to the same restrictions. It may well be that he places the restriction upon the use of land sold for the very purpose of giving to his own lot the exclusive right with respect to that use, — as, for example, the use for the purposes of an hotel, — or it may be that it is intended that only a part of the tract shall be devoted to such uses as make the restrictions desirable. In the absence of a contract, the vendor cannot be held to have bound himself to observe the same restrictions unless it appears that by the adoption of some plan or scheme with reference to the whole tract he has devoted it all to the same purpose, and purchases have been made upon the faith that such purpose would be carried out. It is always a question of fact whether it was the intention of the vendor to make the covenant appurtenant to the land, and give the purchasers a remedy against one another;¹ and if it appears as a fact that the lots were sold pursuant to a plan made known to the purchasers, by which the whole tract was to be subject to the same restrictions, then the vendor will not be at liberty to sell any part of it free of the restrictions. It would seem from the language of the court in the case last cited that unless all the land is put up for sale at once it will require strong proof to subject the remaining land to the restrictions. "If," the court says, "the owner sells all the land, it is evidence of an intention to benefit the purchasers; if he reserves part of it, there may be a question as to that part. If all the lots are put up for sale, it is no matter if they are not sold the first time. There are two lines of cases, — those where there has been only a sale of part of the property; and those where the whole has been put under a building scheme. It is a question of fact, and very material, whether the owner reserves a part for himself."

¹ *Spicer v. Martin*, 14 Ch. App. 12; *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Q. B. D. 778.

If there is a general plan applicable to all the lots, or if the owner by express agreement binds himself not to sell any lots except subject to certain restrictions, then he will be bound by it himself, and the land will be bound by it in the hands of purchasers with notice, whether there be a contract with the purchaser or not. In *Talmadge v. The East River Bank*,¹ in an action against a purchaser who had made no covenant, the court said : —

“Selling and conveying the lots under such circumstances and with such assurances, though verbal, bound Davis (the vendor), in equity and good conscience, to use and dispose of all the remaining lots so that the assurances upon which Maxwell (the plaintiff) and others had bought their lots would be kept or fulfilled. This equity attached to the remaining lots, so that any one taking from Davis any one or more of the remaining lots with notice of the equity as between Davis and Maxwell and others, the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity.”

In *Lenning v. Ocean City Association*² it was held by the Court of Errors of New Jersey that the sale of lots in a camp-meeting ground with reference to a map showing a central plot which it was understood was to be used for tents, was sufficient to bind the vendors not to lease any part of this plot for the erection of wooden dwelling-houses. The obligation was put upon the ground of an implied covenant arising out of the use of this map under these circumstances. See also *Parker v. Nightingale*,³ *Newmann v. Ellis*,⁴ *Duke of Bedford v. British Museum*.⁵ In a recent case in England,⁶ where land was put up for sale as building land subject to restrictive building conditions, and the vendors had not sold all the lots, an intending purchaser of one of them asked for a declaration that he was entitled to the benefit of an implied contract by the vendors that they would observe the same conditions as to the unsold lots. Mr. Justice Stirling said the circumstances of the case must be looked at to see whether the covenants were merely for the protection of the vendors, or whether they were intended for the common advantage of the purchasers. Under the circumstances of this case he held that the vendors had invited the people to buy on the footing that one general plan should bind the whole estate;

¹ 26 N. Y. 105 (1862).

³ 6 Allen, 341.

⁵ 2 M. & K. 552.

² 41 N. J. Eq. 606.

⁴ 97 N. Y. 285.

⁶ *In re Birmingham and District Land Company and Allday*, 27 Notes of Cases, 147.

and he made the declaration asked for. It has been suggested that there are cases of this kind in which the vendor is restrained from using the land in a manner inconsistent with the restrictions, on the principle that a man shall not be allowed to derogate from his own grant ; but this principle belongs to the law of easements arising out of the sale of two tenements, and the case of *Master v. Hansard*,¹ in which it was invoked, was a case in which a lessor, who had taken covenants from his lessees of adjoining lots, permitted one of them to erect a building so as to darken the windows of the other ; and even in this case the court held that the principle did not apply.

We have not attempted to limit or define the principle on which relief is granted against the violation of restrictive covenants, nor to refer to all the reasons suggested by the courts for granting the relief under various circumstances ; but on following several lines of cases, and reading the recent decisions in New Jersey, it seems to be clear that, in order that relief may be granted in favor of any one purchaser against another, there must be something more than the mere covenant of each purchaser with the vendor ; and also that it must appear that back of this was some general plan relating to all the lands sold, intended for the common advantage of the purchasers, and entering into the consideration of the purchases. It must also appear that the sales were made with notice of this plan and under an agreement, express or implied, that the plan was to be carried out with respect to the lots sold or to be sold in pursuance of it. Any purchaser of a part of this land with notice of this plan or purpose is subject in equity to the restrictions imposed for the purpose of carrying it out, and has the benefit of the restrictions placed upon others without regard to the order of their conveyances. His right, as well as his duty, springs out of the original plan under which all alike have taken ; and there is no need to inquire whether the plaintiff is the assignee of the covenant in the defendant's deed, or whether the covenant runs with the land. The restriction imposed by the original plan affects all purchasers alike ; each one consents to it for himself, and has a right to assume that all others have assented to it. It is prior to all the purchases, and becomes a condition upon which the purchases are made. It is a breach of faith to use the land in violation of the restriction, and the Court of Equity will interfere by injunction at the instance

¹ L. R. 4 Ch. Div. 718.

of any person interested to prevent the common purpose from being defeated by any person who has received the benefit of the restriction imposed upon the land for the common advantage.¹ The vendor himself will also be subject to the same equities with respect to any land which, either expressly or by implication, he has agreed shall be used under the same restrictions; and the question in every case is a question of evidence with regard to the intention expressed by the vendors, and the scope and character of the plan as made known to the public and to the purchasers of the lands.²

Edward Q. Keasbey.

NEWARK, NEW JERSEY,
October, 1892.

¹ See the language of Bigelow, C. J., and Beasley, C. J., quoted on pages 281-283 from *Whitney v. Union Ry. Co.*, 11 Gray, 359, and *Brewer v. Marshall*, 19 N. J. Eq. 337. See also *Spicer v. Martin*, 16 Q. B. D. 778.

² *De Gray v. Monmouth Beach Club House Co.*, 24 Atl. Rep. 388; *Nottingham Brick & Tile Co. v. Butler*, 16 Q. B. D. 778-783.

RECORD TITLE TO LAND.

THERE has been a growing interest of recent years in the question of greater certainty and simplification in land titles. Various projects of improvement are before the public. There has been in some parts of the country a great improvement in registry systems, particularly in the matter of indexes. Strong efforts have been made for the introduction of a block system of indexing, designed to reduce to a minimum the number of conveyances to be examined to discover those which pertain to a given parcel of land. Statutes have been passed facilitating the removal of certain classes of clouds upon titles, as, for example, old mortgages, alleged to be satisfied, but not discharged of record. It has recently been proposed, in more than one State, to carry out to their logical results the principles involved in all such legislation, and to introduce a full and complete system of establishment of titles, which shall settle, as against all the world, up to a given date, the title of a given parcel of land, and thenceforth keep it constantly posted up, so that it may be at all times certain and known, — as far as certainty is possible, — and be passed without expense or delay. The practicability of such a plan has been fully demonstrated in the British colony which has given many of our States their present voting system. The advisability of legislation by us in this direction is likely to be more and more discussed in the next few years.

For a full understanding of the merits of any scheme which may be proposed, whether partial or general, it is essential to have clearly before the mind the difficulties of the existing system.

Although a system of registration of deeds prevails to a certain extent in England, title is commonly passed there by a mere delivery of deeds. A system of registration of deeds universally prevails throughout this country; and has prevailed, in the older States, from the very earliest days, substantially in its present form. This difference between the American system and the system generally prevailing in England is so apparent and striking that we are accustomed to consider it as radical. There is a widespread popular conviction that our land titles are "record titles," in the sense that they may be ascertained by an examination of

records. The fact is, that there is no such thing, even in this country, as a "record title," in the proper sense of those words. No title can be ascertained by the records of the registry of deeds, or other records practically accessible, or, indeed, by any records. A title depends, not only upon the deeds and other writings appearing of record, but also upon a great number of facts nowhere appearing of record. It is proposed in this article to call attention to some of these non-record elements of so-called "record titles."

1. The registry of deeds affords no means of verifying the genuineness of signatures, either of the grantors in deeds, or of the magistrates who, under the prevailing American system, take acknowledgments of signatures. In Massachusetts there are thousands of justices of the peace, all with power to take acknowledgments of deeds. A title will often depend upon the genuineness and proper authentication of ten, twenty, or thirty deeds. Each deed purports to have been acknowledged before a magistrate, ordinarily before a justice of the peace. Whether the person of that name was a justice of the peace, may be ascertained at the State House; but whether it was he or some other person of the same name who signed, and whether the signature was genuine or not, there are no means of ascertaining. Among the number of justices of the peace in Boston is one R—— S——; but the Boston directory shows eight persons of that name, and there is no way of proving by the record in the registry of deeds that the R—— S—— who signed a given certificate of acknowledgment is the same R—— S—— who is a justice of the peace. It is perfectly easy, owing to the lack of means of ascertaining the genuineness of signatures, to perpetrate the grossest frauds upon the most careful purchasers; and gross frauds have within recent years been so perpetrated.

2. The title to almost every parcel of land must turn at some stage of its history upon the question of heirship. An owner dies intestate; very possibly no administration is taken out upon his personal estate, and even if it is, the record recitals and the decrees with reference to the question of who are his next of kin are not necessarily conclusive with regard to the heirs' title to the real estate. A subsequent purchaser must, at his own peril, ascertain for himself who were the heirs; and not infrequently, especially after a considerable lapse of time, this is a matter of great difficulty. Occasionally it is impossible, particularly in the case of a person of foreign birth leaving no issue, to ascertain with any

degree of assurance whether those who claim to be his heirs are such, or are all the heirs. A question of this character, once arising in a title, becomes a more and more difficult and dangerous question as time goes on; and under the various exceptions which prevail in many of the States in the statutes of limitations, such a defect may not be cured even by a great lapse of time.

3. The fact that a deed appears of record is only *prima facie* proof that it ever became operative by delivery. If I execute and acknowledge a deed, but do not deliver it, and if, without negligence on my part, it is stolen from me by the grantee, or, to take a more likely case, is by mistake, and without authority, delivered to him by one who holds it in escrow, it passes no title; and the fact of its being recorded does not help it. The Massachusetts Legislature of 1892, to meet this difficulty, passed an Act providing that the record of a deed, lease, power of attorney, or other instrument duly acknowledged or proved in the manner provided by law, and purporting to affect the title to lands, shall be conclusive evidence of the delivery of such instrument in favor of purchasers for value, without notice, claiming thereunder. This Act throws upon one who has executed a deed the responsibility of keeping it in his own hands until delivery, at his peril.

4. Record statutes ordinarily allow an unrecorded deed to be effectual as against persons having notice of it. A recorded deed is therefore always open to a possible attack upon the ground that there is a prior, unrecorded deed; that he who took the later deed took with notice of the prior; and that subsequent purchasers, if any, also had notice. It is a matter of surprise that fraudulent ingenuity has not more often resorted to this comparatively easy field.

5. Questions of incapacity to contract, as by insanity or infancy, are not determined by the record of a deed. One who takes what is called "a good record title" assumes, at his peril, the mental capacity and the full age of all the successive grantors in his chain of title for a long way back. Instances are not lacking in which a *bona fide* purchaser has lost his title by the establishment of unsoundness of mind or infancy on the part of a prior owner of the land.

6. Questions of marriage and divorce enter very largely into title. In most of the States the fact of marriage is, in a certain sense, a fact of record; but marriage records are ordinarily made according to the city or town of the residence of one or both of the parties, or the place where the marriage is solemnized; and

people move about so much that some of the grantors in a given chain of title are almost sure to have been married in some State other than that where the land lies, and perhaps in a remote State, and in a locality not easily to be ascertained or reached at the time when the title is being examined. It is not ordinarily practicable, in examining a title, and in the limited time which can commonly be allowed, to attempt to trace the records of all the various marriages which affect the title. The question of divorce is still more difficult. The total number of divorces within the past twenty years has been enormous, and the question of the validity of a given divorce, as freeing a certain parcel of land from inchoate dower or curtesy, or as fixing heirship, may be a vital factor in any title. All that a conveyancer can ordinarily expect to ascertain, and all that he ascertains from the record in the registry of deeds, is that a given grantor claimed to be married or unmarried, or to have been married to A or B. The conveyancer cannot know, if such be the case, as it often must be, that the supposed marriage, or absence of marriage, is based upon a divorce invalid by reason of lack of jurisdiction or other defect in a divorce suit.

7. A vast number of estates, particularly in the older parts of the country, are affected by incumbrances, or even complete change of title, effected by prescription or adverse possession. Prescription and adverse possession do not appear of record ; and yet they may burden a title, or entirely extinguish a title apparently good of record.

8. In the new States lands are commonly described with almost mathematical exactness, by reference to public surveys and plats. In the older States this is commonly not the case ; estates often have irregular and arbitrary outlines, and the boundaries are fixed by trees or other natural monuments, by the lands of adjoining proprietors, or by stakes and stones. It is often a matter of the greatest difficulty to ascertain what particular pine-tree is the one referred to, or where a certain pine-tree stood fifty years ago. In such of the old towns as retain a considerable proportion of the original stock, there are old men whose habits of mind, occupation, or natural tastes have made them the repositories of tradition upon this head, and frequently by their aid alone can the monuments and boundary lines of woodland and other country lands (perhaps suddenly risen into value) be settled. In the case of flats this difficulty is very marked. Some of the most intricate questions of fact litigated within recent years in Massachusetts have turned

upon the line of ancient watercourses or the line of original upland. In many cases the original line of upland has been changed, either by natural processes or by filling, and in the case of flats, under the laws generally prevailing, there often arises, not merely the question of ownership of upland, but also the question of the right to fill, or to wharf, out to a harbor line. The question of whether a valuable wharf or filling privilege in a great city is in A or B may turn upon the question whether or not A's predecessor in title, sixty years before, in selling upland to B's predecessor in title, withheld a hand's breadth of upland. A case has recently been before the Board of Harbor and Land Commissioners of Massachusetts, in which the question of title to a valuable wharf turned purely upon possession. Prior to May 27, 1867, a twenty-years statute of limitations ran against the State in respect of lands below high-water mark. Certain persons, with their predecessors in title, had from the early part of this century occupied and used a certain wharf, and the dock alongside of it. Repeated sales and mortgages had been made. A sale having been negotiated in the past year, the question of title arose. The vendors could show no record title; they had therefore to fall back upon a title by prescription or by the effect of the statute of limitations. To this end it was essential to them to show an exclusive possession by themselves and their predecessors, under claim of right, to the wharf, to its present extent, during a continuous period of not less than twenty years prior to May 27, 1867. No witnesses could be found whose memory upon the point went back to 1847. An official plan made by State officers shortly before 1847 indicated that at that date no wharf of the extent in question was standing. Fortunately, however, for the vendors, a careful search disclosed plans of 1845 and 1846, which, being reduced to a common scale and compared with each other and with natural monuments, clearly indicated the existence, May 27, 1847, of a wharf of the required extent. The presumption of continuous use for a few years after that, with actual testimony of use for the remaining period of time, completed the title. But for the purely accidental facts that these later plans were made when they were made, instead of a year or two later, the vendors would very likely not have been able to show title; and yet they had in fact a perfectly good title.

9. Many titles hinge at some point in their history upon the validity and operativeness of a conveyance by a corporation which

has previously owned the land. A deed from such a corporation, we will say, appears upon the record ; it purports to have been executed in behalf of the corporation by its president or its treasurer, and to have been acknowledged by him. Whether he had authority to execute, deliver, and acknowledge such deed is a question of fact entirely outside the record of the registry of deeds, and turns upon facts appearing of record only in the record book of the corporation. To find that record book, particularly if the corporation be a religious society and not a business corporation, it is usually necessary to hunt up the clerk of the parish at his residence, wherever he may happen to live ; and even if the record in his hands appears to be sufficient, the purchaser has not the evidence in his own hands, but is dependent upon the care which may be taken of the record book by the clerk and his successors. The reports which have been published within the last few years by a Commissioner of the State of Massachusetts upon the records of parishes, towns, and counties show the extreme peril to titles from this source. Corporation record books have been kept with very little care, and have frequently been destroyed, lost, or accidentally burned. A question recently arose in a title as to the right of control, and incidentally thereto as to the actual membership, of Theodore Parker's old parish in West Roxbury. These questions turned entirely upon records of the parish ; but the parish record book had been recently burned in a fire which consumed the clerk's house. In order to make a satisfactory title it was necessary to get an Act of the Legislature rehabilitating the parish, and reciting in detail the names of the persons ascertained and determined by the Legislature to be members of it.

10. Many titles turn at some point of their course upon devise. A man dies, his will is probated, or he is adjudged intestate, and those who appear to be his devisees or heirs, sell. In most of the States, and in Massachusetts, except as far as the rule is there modified by a very recent statute, purchasers of such real estate buy at their own peril, and take the risk of a will, or an earlier will, being found and probated, even at a very remote period of time. In a case recently decided in Massachusetts, a title of nearly sixty years standing was overturned by the accidental discovery, nearly sixty years after the testator's death, of a will until that time unknown. It is now by a recent Massachusetts statute provided that after a lapse of two years from the probate of a will

or a judicial determination of intestacy, purchasers for value without notice shall take an absolute title, notwithstanding the subsequent probate of a will.

11. One element in the course of a title is very likely to be the foreclosure of a power of sale mortgage, and in many of the States, as, for example, in Massachusetts, there are no judicial proceedings in such foreclosure. A purchaser, therefore, under a foreclosure title takes the title at his peril. He runs the risk of several facts which nowhere conclusively appear of record, none of which are evidenced of record, otherwise than by an affidavit of the mortgagee, which may be false, or may be mistaken, and is open to rebuttal by oral evidence. He takes the risk, for instance, of there having been an actual mortgage debt existing at the time of the foreclosure, or of the mortgage debt having been actually overdue. A mortgage may be apparently good, but in fact the mortgage debt may have been duly paid off, at maturity, without a record discharge. A mortgagee's sale, upon such a state of the record, would convey an apparently good title; and yet the purchaser would have no title at all. Even eliminating cases of deliberate perjury and fraud on the part of a mortgagee, there may well be a question of law as to whether there is or is not an existing mortgage debt. The mortgagor may claim that the debt has been satisfied by operation of law. The mortgagee may dispute this, and may honestly make his affidavit that the debt was due. In such case, the purchaser, if the debt had in fact been extinguished, would take no title.

12. Not infrequently there enters into a title the question of the validity of a partition. Certain judicial proceedings for partition among heirs, to have any validity, must embrace all the lands held by them in common and under the same title and lying in one county. An omission of one parcel so held invalidates the proceedings, at least as against a person who does not actually appear and take part in it. The question of whether certain lands are in fact all the lands left by a given testator or intestate and owned in common by his heirs or devisees within the county, is a question of fact, and one upon which heirs or devisees are not unlikely to make a mistake. It frequently happens, in the country, that a man owns a great number of separate tracts of woodland, and that he does not know, as matter of memory, and that his heirs and devisees fail to ascertain, the full extent of his ownership. A title has quite recently come within the knowledge of the writer,

which was invalidated by reason of the omission, in a judicial partition, of a small parcel of land probably not known to the parties.

13. The practice of creating upon lands those equitable easements or burdens which we call restrictions has become more and more common. It is very unusual in a deed creating restrictions to state in behalf of what particular lands, whether of the grantor or others, the restrictions are to operate. It appears to be the law that one who owns land may convey a parcel of it with restrictions which will operate, not only in favor of his own remaining land, but in favor of his neighbors' lands, by way of a voluntary gift or donation from him to them, and that without their even knowing or consciously accepting the benefit. It very frequently happens, particularly in a case of the division of land into building lots, that it is a matter of great difficulty to ascertain, — and a matter to be settled entirely by oral evidence as to the situation of the lands and the intent of the parties, — to what lands a given restriction enures, and what lands, therefore, must release it, if it is to be released.

14. It frequently happens that the validity of a title turns upon the effect or operation of a judgment, — serving perhaps as the basis of an execution sale. The validity of this judgment may turn upon intricate questions of constitutional law. A recent judgment in Massachusetts was in pursuance of the express language of a Massachusetts statute, and yet was held to be invalid, upon the ground that the statute was unconstitutional. A judgment may be invalidated by reason of some jurisdictional fact which nowhere appears of record. The decree of a court of strictly limited jurisdiction, as, for example, a probate or surrogate's court, often illustrates this difficulty. If the facts do not exist upon which the jurisdiction of such a court is predicated, the decree, although apparently good of record, is a mere nullity. It is held, for example, in Massachusetts, under statutes, that if a probate judge is in fact a creditor of a certain person deceased, he is absolutely disqualified from sitting, and that his decree, determining intestacy or allowing a will, is not merely reversible for error, but is an absolute nullity, although the disqualifying fact nowhere appears of record. In Massachusetts, therefore, and probably in many other States, such a decree gives a purchaser who claims title under it only a title at his own peril, and puts him upon inquiry as to all jurisdictional facts. A striking illustration of this difficulty is seen in a reported case which applied in fact to personal property, but would have

applied in precisely the same way to real estate. A seaman was supposed to have died ; his next of kin applied for administration upon his estate ; he was adjudged to have died ; administration was granted ; his administrator demanded payment of a savings bank account, and received payment, and, indeed, could have recovered it from the bank, upon the presumption of death, if the bank had refused to pay it. Afterwards the depositor appeared, and was held to be entitled to the money. The decree of the probate court was a mere nullity, death being essential to its jurisdiction. The emblem of a funeral urn, which appears upon the surrogate's seal in some of our States, is not a mere ornament or formality ; it indicates a jurisdictional fact. If, instead of a savings bank deposit, the supposed deceased had owned land, and the land had been sold by an administrator for payment of debts, the alleged intestate, upon appearing, could have recovered the land from a *bona fide* purchaser for value.

15. One may convey his land, or an interest in it, not only by giving a conveyance of it, but by receiving a conveyance of other land. It is familiar law, for example, that the deliberate acceptance of a benefit under a will, with knowledge of the facts, estops the recipient from contradicting or setting up title against the terms of the will, and therefore may operate to estop him from denying the title of another in the recipient's own land. This may be illustrated for the present purpose by an entirely natural supposition. A man of means, upon the marriage of his daughter, decides to give her a certain building-lot near his house, and to put up a house for her on it. He gives her a deed of the land, but circumstances change his plans ; he never builds a house, and after a time he forgets that he ever gave her the land. In his will he undertakes to devise the land, as his, to his son, and makes other provision in his will for the daughter. If, now, the daughter, with knowledge of the facts, accepts the provision made for her by the will, her brother becomes to all intents and purposes the owner of her land, as against all the world. His power to make a good title of record is not affected by his lack of a record title, because there is no provision of statute requiring in such case a record title.

The principle which thus operates in the case of a will may operate in the case of conveyance by deed. In *Dyer v. Sanford*,¹ Chief Justice Shaw says,—

¹ 9 Met. 395, at p. 404.

"But we have no doubt that by apt words, even in a deed poll, a grantor may acquire some right in the estate of the grantee. . . . We think a grant may be so made as to create a right in the grantee's land in favor of the grantor. For instance: suppose A has a close, No. 2, lying between two closes, Nos. 1 and 3, of B, and A grants to B the right to lay and maintain a drain from close No. 1, across his close No. 2, thence to be continued through his own close, No. 3, to its outlet; and A, in his grant to B, should reserve the right to enter his drain, for the benefit of his intermediate close, with the right and privilege of having the waste water therefrom pass freely through the grantee's close, No. 3, forever. In effect, this, if accepted, would secure to the grantor a right in the grantee's land. . . . It results from the plain terms of the contract."

In *Case v. Haight*,¹ A, owning the south bank to the bed of the stream, conveyed to B, who owned the north bank and northerly half of the bed up to B's bank, reserving certain dam rights in the river on the land conveyed, and undertook further to "save and reserve" a right to butt a dam on B's bank. It was considered by the court that this provision, either by way of implied covenant or of estoppel, gave to the grantor an easement in the land of the grantee.

A purchaser of land, therefore, examines at his peril, — if not all the unrecorded conveyances to his grantor, as well as by him, at least all the recorded conveyances to his grantor, — in order to see that by the acceptance of some deed of other land his grantor has not lost title to or diminished his title in the land in question.

The foregoing suggestions introduce nothing new. They are brought together here, not for the purpose of instruction, but for the purpose of emphasizing the element, in our so-called "record titles," of facts not appearing on the records of the registry of deeds, and, many of them, appearing nowhere of record.

The question naturally arises, whether the aim of our so-called "record title" system should not be carried out. While it is true that every title is exposed to a thousand possible objections by matters not appearing on the records of the registry of deeds, and appearing nowhere in a convenient and accessible manner, it is equally true that in ninety-nine cases in a hundred these elements, in fact, would, upon inquiry, be settled in favor of the supposed title. The difficulty ordinarily lies, not so much in the

¹ 3 Wendell, 632.

actual risk of loss of title, as in the delay, expense, and inconvenience of making the inquiry, or of risking the title without it. Titles commonly have to be risked, with a very slight inquiry, upon most of these questions, and to that extent we are transferring titles in this country as they are transferred in countries where titles are passed as they were in the days of the ancient Hebrews, by oral transactions made in the presence of the elders. It is only to a limited extent that we have departed from the ancient usage.

The inquiry as to the propriety and practicability of an improvement in these respects resolves itself into three heads:—

1. Can there be a constitutional mode of procedure, by which a given title can, as against all the world and up to a given point, be conclusively adjudicated to be in a given person, subject to given limitations in favor of other given persons?

2. Are there precedents for such an improved procedure, recognizing the principles upon which it would proceed?

3. What is the simplest way of reaching the desired result?

1. The constitutionality of such procedure has been settled beyond question. It has been repeatedly determined within recent years by the courts of last resort of several of the States, and by the Supreme Court of the United States, that a State statute is constitutional which enables one in possession of land, claiming title, to file a petition for quieting and establishing his title against all the world,—against persons outside the State as well as persons within the State. The only essentials to the validity of such procedure are that a fair notice, either by general advertisement or otherwise, and an opportunity to be heard be given; second, that the statute provide either that the decree shall operate directly upon the land, and itself cut off any possible outstanding adverse titles, or that it shall empower some person to give a deed in the name of all possible adverse claimants, releasing their rights. It is only statutes which have failed in these latter respects that have been declared unconstitutional. It is not requisite under such statutes that adverse claimants shall be named or known or identified. They may be described in general terms as the heirs of a given person named, or even as “unknown persons.” A large proportion of the States have statutes of this character covering more or less of the whole field of title. In some States the statutes cover practically the whole field. These statutes are frequently resorted to.

2. There is abundant and familiar precedent in all the States for such procedure. The only difficulty with existing procedure is, not that it falls short in principle, but that it lacks completeness. Equity has always recognized proceedings to remove clouds from titles: but in equity procedure there were limitations which rendered the procedure inapplicable in many cases where it was needed. This head of equity jurisdiction has been gradually broadened in many States, and the Supreme Court of the United States holds that extensions of it are cognizable by the equity courts of the United States.

A recent Massachusetts statute of this character provides that an owner of land incumbered by a "possible" condition, restriction, or stipulation, may bring suit against all the world, — naming such defendants as he can, and summoning in others by classes, or as "unknown persons," — to have the validity of such possible condition, restriction, or stipulation determined, and its scope, operation, and effect fixed, by a decree. A recent suit in Massachusetts, under this statute, named some fifty defendants; other persons were permitted to appear as defendants having possible interests, and still other possible defendants, notified by advertisement, as "persons unknown," were theoretically defendants, and were, under the terms of the statute, represented by a person appointed by the court in their interest, at the expense of the petitioner, and were bound by the decree.

All that we need, in order to post our titles up to date, and make them good as against all the world, is to pursue familiar lines of existing law.

In aid and furtherance of a general scheme of title adjudication such as has been outlined above, there should be legislation providing that from and after a judicial settlement of a given title all matters affecting its future course shall, as far as the nature of things will permit, be made to appear of record, and that either the primary record or a duplicate of it should be in the office in which is the record of the establishment of the title. It should also be provided that in case of change of title by death, the probate or surrogate's court shall make a decree, binding upon all parties, as to the facts of heirship or devise, and may free the lands of the deceased from liability for his debts, upon the giving of security, precisely as the personal estate of a person deceased is, by the present rules of law, freed from such liability, upon the giving of an executor's or

administrator's bond. By provisions of this character, invading no one's rights, a title could be kept substantially "posted up to date," so that a transfer of it at any given time could ordinarily be effected by the mere surrender of a certificate of title and the taking out of a new certificate, without delay and with little expense.

To meet the most extreme demands of caution, there might, in every instance, be made, by order of the court, and at the expense of the petitioner for establishment of title, a careful examination of the title, according to the most approved method open at the time, — according to the method which a savings bank, for example, would adopt for a loan on mortgage, or a cautious purchaser for a purchase. This would give all the assurance which any purchaser or lender at present gets in any case. In the second place, there might be imposed, as there is under the Australian system of registration of titles, a very trifling tax, in every case of establishment of title, — perhaps one twentieth of one per cent upon the value of the land, — to go into an insurance fund. The experience of the Australian colonies, the experience of purchasers and investors in this country, and the experience of our title insurance companies, show that a very small insurance fund would cover the few isolated cases of actual loss of title which might possibly occur. At present, statutes which cut off titles upon summary proceedings seldom or never make provision for such examination or for such insurance. When the city of Boston is permitted by statute to take great tracts of land, covered with houses, in the heart of the city, for sanitary purposes, a very brief period is provided within which claimants are to make themselves known and call for payment. Those who do not appear within this period are cut off. The same is true of tax and bankruptcy sales of land, which, as the phrase is, "ransack the title," and in a short time cut off everybody both from claim to the land, and from claim to its proceeds. The legislation of our States is full of examples of the cutting off of possible interests, in a very short period, by mere publication notice. The plan outlined in this article, even without official examination of title, or insurance, would go not one whit beyond the principle of such legislation. Every one, however, would be willing to respect the feelings of the timid, and no one would object to a provision for examination of the title and for insurance indemnity.

H. W. Chaplin.

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ELECTRIC STREET RAILWAYS — ADDITIONAL BURDEN. — The case of *Detroit City Ry. v. Mills*,¹ decided by the Supreme Court of Michigan, and very recently affirmed by the case of *Dean v. Ann Arbor St. Ry. Co.*,² almost convinces one of the perfect elasticity of the common law. But in spite of the court's appeal to the progressive tendency of the times, common experience and observation arouse a feeling of dissent from the proposition that "the use of a street by an electric railroad, with poles and overhead wires, is not an additional servitude for which abutting owners may demand compensation."

It seems well established that at the present time an ordinary steam railroad imposes a new burden,³ and that a horse railroad does not;⁴ and the distinction, which is one of degree, turns on the different effects produced on the streets occupied by the railroads, and on the beneficial use of abutting property. In allying the legal position of the electric railroad to that of the horse railroad, the Michigan court seem to have made assumptions and statements of fact which will not bear close examination. Grant, J., tells us that electric cars are not more noisy, do not cause greater obstruction or hindrance, impose no greater burden, except by their poles, than horse-cars; and that they do not occupy more space than horse-cars with the horses that draw them. From these pro-

¹ 48 N. W. Rep. 1007.

² 53 N. W. Rep. 396.

³ *Mahon v. Ry. Co.*, 24 N. Y. 658; *Kucheman v. Ry. Co.*, 46 Ia. 366; *Chamberlain v. Ry. Co.*, 41 N. J. Eq. 43; *Terre Haute, &c., Ry. Co. v. Scott*, 74 Ind. 29; *Indianapolis Ry. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Ry. Co.*, 75 Ill. 74; *Imlay v. Ry. Co.*, 26 Conn. 249; *Adams v. Ry. Co.*, 18 Minn. 260 (see also 22 Minn. 149); *Cox v. Ry. Co.*, 48 Ind. 178; *Carson v. Ry. Co.*, 35 Cal. 325 (see also 41 Cal. 256); *Blerch v. Ry. Co.*, 43 Wis. 183; *Laurence Ry. Co. v. Williams*, 35 Ohio St. 168; *Williams v. New York Central Ry. Co.*, 16 N. Y. 97; etc. See also cases and authorities cited in *Taggart v. Ry. Co.*, 19 Atl. Rep. 326.

⁴ *Elliott v. Fairhaven Ry. Co.*, 32 Conn. 579; *A. G. v. Met. Ry. Co.*, 125 Mass. 515; *Pillon on Mun. Corp.*, 868, and cases cited in notes; *Shea v. Ry. Co.*, 44 Cal. 414; *Citizens' Coach Co. v. Camden H. R. Co.*, 33 N. J. Eq. 267.

positions we must, with all deference, dissent. The noise and jar of the ordinary electric cars, often joined in trains, the speed with which they run, the danger of driving along and upon the tracks, or even across them, the risk of injury or death from contact with broken wires, the unsightliness of the poles and cars and cross-wires and guard-wires and trolley-wires, are all matters of common knowledge.

That telegraph and telephone poles are an additional servitude is fairly well settled,¹ the cases to the contrary, such as *Pierce v. Drew*,² in Massachusetts, being based on highly artificial analogies between the ancient and modern use of highways for purposes of communication. To avoid this class of decisions, the Michigan court would say, with the Supreme Court of Rhode Island,³ that telegraph and telephone wires are only very indirectly used to facilitate the use of streets for travel and transportation, whereas the poles and various wires of the electric railroad are distinctly ancillary to the use of the streets as such. This distinction is, as Judge Dillon remarks, "so fine as to be almost impalpable."⁴

It is said that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to new compensation, in the absence of a statute giving it. As it stands, this statement can scarcely be maintained. Granting that the abutting owner dedicates to the public the whole beneficial use of part of his land for the purposes of a street, his property rights of light, air, and access free from danger to his remaining land still subsist. Surely the need of the public for steam railroads is much greater than its need for electric railroads; yet steam railroad corporations would not be allowed to run their trains on public streets merely as a new method of using an old easement, and if they would lay their tracks across lands not belonging to them, they must obtain the right to do so by purchase or condemnation, into which consequential damages enter as an element. The need of the public is to be considered when the right to take the property is under consideration, and not when the courts have to decide whether compensation shall be allowed.

If the public needs a new method of transportation, the public can and should pay for private property rights destroyed or impaired in establishing that new method of transportation.

THE SEVENTEENTH SECTION OF THE STATUTE OF FRAUDS. — Iowa has the seventeenth section of the Statute of Frauds, but with the limitation that it shall not apply "where the article of personal property sold is not, at the time of the contract, owned by the vendor, and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same." Code, § 3665. The construction of this article came squarely before the Supreme Court of Iowa for the first time in the case of *Mighell v. Dougherty*, 53 N. W. Rep. 402. Here the defendant orally contracted to deliver to the plaintiff, in a marketable condition, the oats then standing unthreshed in the defendant's field. For delivery in such condition, the expenditure of labor, skill, and money was necessary; but was it necessary, within the meaning of the exception, for "producing or procuring and making ready for delivery"?

¹ See 2 Dillon on Mun. Corp., § 698 *a*, and cases cited.

² 136 Mass. 75.

³ *Taggart v. Ry. Co. (R. I.)*, 19 Atl. Rep. 326.

⁴ 2 Dillon on Mun. Corp., p. 893, *n*.

It was held that cutting and putting into marketable condition was not a producing, which means "giving being or form to," "manufacturing," "making;" nor a procuring, which means "bringing into possession," "obtaining." Furthermore, the court say this was work which the vendor would naturally take in fitting his material for the general market.

It seems probable that this limitation was inserted to avoid the perplexities of the New York rule, *Parsons v. Lotts*, 48 N. Y. 652, that the statute does not apply when the chattel is not in existence at the time of making the contract, and to avoid the curious, if just, rule of Massachusetts, *Goddard v. Binney*, 115 Mass. 450, that if the vendor makes or prepares for the general market, it is a sale within the statute, and if he makes or prepares to special order, not as he would in the general nature of his trade, it is not a sale within the statute. The latter is a clear case of reading into the statute clauses which the words cannot possibly contain. The former, the New York rule, is based on the earlier English cases, but has not advanced as the English doctrine advanced.

The principal case is another example of the tendency to force from this section an equitable doctrine. But by such a decision the heart of the provision is eaten out. After viewing the attempts of various American jurisdictions to hammer strained rules out of the statute, it is a relief to consider the more natural and literal interpretation of the English courts, *Lee v. Griffin*, 1 B. & S. 272, that any contract which is to result in the sale of a chattel is within the statute; or the wisdom of some legislatures, *e. g.* Ohio, in entirely omitting the seventeenth section from their Statute of Frauds.

WINDSCHEID AND V. IHERING.¹—German legal circles have sustained an irreparable loss in the last two months in the deaths of v. Ihering and Windscheid. The former was perhaps the better known in foreign countries; the latter influenced the development of German law as no other writer in the past twenty-five years.

Rudolph von Ihering gathered around him in his retirement at Göttingen an enthusiastic audience to listen to his brilliant discourses and to participate in the discussions of legal questions. His little book, "Jurisprudence of Daily Life," contains a multitude of hypothetical cases of every-day occurrence such as he was wont to put in his classes. In Göttingen, too, he found the necessary peace and quiet to develop and improve his great work on the "Spirit of the Roman Law,"—a work that in these days of Roman law studies well deserves the honor of a translation into English. Ihering's was a philosophical nature; his field of work lay in the domain of the philosophy of the law. The indefiniteness and vagueness incidental to the vastness of philosophical research permeated his writings: his great knowledge of the law itself, in its origin, growth, and development, acted as a corrector: his style attracted the thoughtful reader, even the layman, and thus he did much to popularize the study and the knowledge of law. As editor of the leading law quarterly on Roman law, he contributed much to the solution of practical legal questions. But one of his essays, I believe, has been translated into English, "The Battle for Law," a brilliant plea for the maintenance of principle and individual right, at whatever cost, as the chief factor in the

¹ We are indebted for this note to Julian W. Mack, Esq., of the Chicago bar.

creation and development of a sound body of law for the nation. Incidentally he treats of the Shylock problem.

Bernhard Windscheid was a man of a different type. Cold and slow in his speech, uninteresting in manner, lacking all the graces of the orator, he succeeded in attracting to Leipsic thousands of students by the magic of his name, and in holding their close attention by the profoundness of his reasoning, the clearness of his analysis, the aptness of his illustrations, the absolute logic of all his thought. No book is consulted as much in Germany by jurists, lawyers, and judges, no work is cited as often in every court of the Empire, as Windscheid's "Pandects." It is his one great work; and in it he has accumulated the whole literature of the development of Roman law, from before the time of Justinian to the present day. Each successive edition bears fresh evidence of his critical and analytical powers; a word or two suffices to characterize accurately the value, absolute and relative, of each new monograph or book on any branch of Roman law.

Windscheid was a member of the Commission to prepare a Code of Civil Law for the German Empire, from its inception in 1874 until 1883. His views must have influenced the decision of many a mooted point. But the decisive, though unconscious, influence of the man, or rather of the man as evidenced in his "Pandects," appeared when the first project of the Code was given to the public in 1888. The unanimous cry of the Germanistic school, the chief opponents of the Code, was that it is Windscheid's book with additions. The kernel of truth in the charge, though ground for opposition from those who believe that the spirit of the German and not of the Roman law should be the basis of the Code, was one of its chief merits in the eyes of its friends. Though Windscheid had taken no part in the deliberations of the Commission during its last five years, yet such was the power of his book that his analysis and classification, his views, and oftentimes his very words, had been adopted and perpetuated in the Code. Much will be changed before the Code becomes law, but the feeling in Germany is nearly unanimous that the fundamental lines must remain as recommended by the Commission.

The works of v. Ihering and Windscheid should find a place in every large library in which the pursuit of legal science holds at least some place with the eager search for judicial precedents.

FUSTEL DE COULANGES AND BRUNNER.¹—In the second volume of his great work on the "History of German Law" Professor Brunner, to whom we are deeply indebted for his investigations into and discovery of the origin of the jury, has an interesting note on Fustel de Coulanges, the celebrated French author of the *Ancient City*. He says (vol. ii. page 2, note 2), "An exception [to the current of authority that Frankish law is a mixture of legal rules of both Germanic and Roman origin] is Fustel de Coulanges, for whom everything is Roman. Fustel de Coulanges is a man of valuable but peculiarly limited parts. His fundamental method is to take for examination a portion of the sources of law narrowly bounded both as to time and space, and to ignore purposely everything lying beyond this. The result is that he often misunderstands the sources and does not hesitate at violent interpretations in order to sustain the general result that he obtains from his narrow field of research. It

¹ We are indebted for this note to Julian W. Mack, Esq., of the Chicago bar.

does not seem to be superfluous to note this, because there is ground for anxiety in the fact that Fustel de Coulanges is beginning to obtain a following in Germany for his scientific system that rightly opposes the Babylonian tower of brilliant conjectures, but that from the very beginning shuts out every appreciation for the continuity of the development of legal history by condemning as unmethodical even the attempt to strive for it."

RECENT CASES.

ADMIRALTY — MARITIME LIENS. — *Held*, that a stevedore rendering services in loading or unloading cargo in other than the home port has a maritime lien therefor.

The Ilex, 2 Woods, 229, is overruled, and the rule on other circuits followed. The services of the stevedore are of a maritime character, and when performed for a vessel in a foreign port are not rendered upon the personal credit of the owner, and the stevedore is as much entitled to a lien as a person who loans money to the ship-master to pay the stevedore. *The Main*, 51 Fed. Rep. 954 (C. Ct. of App., La.).

CARRIERS — RAILROAD TICKETS — TRANSFERABILITY. — Where a railroad coupon ticket for passage over different roads was sold by one company as principal as to its own line, and as agent as to the other roads, at a reduced rate, and subject to the stop-over regulations of the different roads, but without any stipulation as to a continuous passage, or against its transfer, — *Held*, that the contract was not entire, but severable; and though the passage on any one road would have to be continuous, and by one holder, yet the ticket could be assigned at the end of any line, and would be good for the remainder of the journey in the hands of the transferee. *Nichols v. Southern Pacific Co.*, 31 Pac. Rep. 296 (Oregon).

This is in accord with *Hoffman v. Railroad Co.*, 45 Minn. 53.

CONSTITUTIONAL LAW — MANNER OF CHOOSING PRESIDENTIAL ELECTORS. — Public Acts of Michigan, 1891, No. 50, provide for choosing presidential electors by congressional districts instead of by all the people on one ticket. *Held*, that it is a question for the court whether such method of electing is constitutional. *Held*, also, that the method prescribed in said Act is constitutional. U. S. Const. art. 2, § 1, gives to the State legislatures full power to determine the mode of appointing electors. The fact that for many years it has been the custom to choose electors on a single ticket has not deprived the legislatures of the power originally given them. The fourteenth and fifteenth amendments to the Constitution are not violated by the law in question. The decision of the State court (52 N. W. Rep. 469) is affirmed. *McPherson et al. v. Blacker, Secretary of State*, 13 Sup. Ct. Rep. 3.

CONSTITUTIONAL LAW — POLICE POWER — COAL WEIGHING ACT. — A statute required operators and owners of coal mines, where the miner is paid on the basis of the amount of coal mined by him, to weigh the coal on pit cars before it is screened, and to compute the compensation on the weight of the unscreened coal. *Held*, that the statute was unconstitutional, because it deprived persons, without due process of law, of the property right of making contracts. *Ramsey v. People*, 32 N. E. Rep. 364 (Ill.).

This decision is in direct conflict with the recent case of *Peel Splint Coal Co. v. State*, 15 S. E. Rep. 1000 (W. Va.); but it carries out the reasoning of the mass of previous authority. Cf. *Frorer v. People*, 31 N. E. Rep. (Ill.), and cases there cited.

CONSTITUTIONAL LAW — TRIAL BY JURY OF LESS THAN TWELVE. — Under a provision of the Constitution that "the right of trial by jury shall remain," and that "the legislature may authorize a trial by a jury of a less number than twelve men," — *Held*, that an Act providing that after the impanelling of a jury, if from death, sickness, or any other cause any of the jurors should be unable to attend, the court might enter that fact on their journal, and the proceeding should then continue in the same manner and with the same effect as if the whole panel was present, was unconstitutional, as delegating to the court a discretion vested in the legislature. McGrath, C. J., and Montgomery, J., *dissent*. *McRae v. Grand Rapids L. & D. R. Co.*, 53 N. W. Rep. 561 (Mich.).

The decision seems unnecessarily strict. The legislature can hardly be said to

delegate discretion to the trial court, and there is nothing peculiar to the nature of a jury making a trial by less than the number of jurors impanelled an impossibility.

CONTRACTS — ABANDONMENT OF CONTRACT. — *Held*, that conduct of the defendant evincing his intent not to be bound by a contract, although it justified the plaintiff in treating the contract as rescinded, did not entitle him also to sue for future profits. Plaintiff could recover only the value of services actually performed, on *quantum meruit*. *Lake Shore & M. S. R. R. v. Richards*, 32 N. E. Rep. 402 (Ill.).

The court follow *United States v. Behan*, 110 U. S. 338, and the cases there cited.

CORPORATIONS — CONTRACT BY CITY FOR BENEFIT OF SOME OF ITS CITIZENS. — A city contracted with a railroad company not to oppose before the railroad commissioners certain changes which the railroad company desired to make in its line. The consideration for the contract was the promise by the railroad to pay to owners of property upon streets which the new line should cross such damages as arbitrators should award them. *Held*, that a contract made by a city in consideration of benefit to private individuals is void, because against public policy, and cannot be enforced by the city. *City of New Haven v. New Haven and Derby R. R. Co.*, 25 Atl. Rep. 316 (Conn.).

CORPORATIONS — ULTRA VIRES — PURCHASE OF ANOTHER CORPORATION. — Plaintiff, an Ohio corporation, bought up all the shares of a Tennessee corporation of which the defendant was president, for the purpose of controlling it. Part of these shares were bought of the defendant under a contract by which he became liable for one half any amount it might be found necessary to pay in satisfaction of claims against the company. In an action for this amount it was *held* (1) that the contract for purchase of the stock was void, as being outside the object of the plaintiff company. The fact that the two companies were engaged in the same business does not prevent the purchase being *ultra vires*. (2) Since an *ultra vires* contract is absolutely void, the defendant can set up this defence, though the contract has been performed, and he has received the benefit of it. *Buckeye Marble Co. v. Harvey*, 20 S. W. Rep. 427 (Tenn.).

CRIMINAL LAW — INSANITY — BURDEN OF PROOF. — When the defence of insanity is introduced in a criminal trial, the prosecution must establish beyond a reasonable doubt the sanity of the accused. *Armstrong v. State*, 11 So. Rep. 618 (Fla.).

The American courts are very evenly balanced on this question. *Chase v. People*, 40 Ill. 352, *State v. Bartlett*, 43 N. H. 224, *accord*; *Pannell v. Com.*, 86 Penn. 260, *State v. Lawrence*, 57 Me. 574, *contra*.

CRIMINAL LAW — INTERSTATE EXTRADITION — POWER TO TRY FOR DIFFERENT CRIME. — A person brought into New York by extradition proceedings to answer a charge of grand larceny may be rearrested and tried upon a charge of robbery growing out of the same facts. 19 N. Y. Supp. 271, affirmed (see 6 HARVARD LAW REVIEW, 158). *People ex rel. Post v. Cross*, 32 N. E. Rep. 246 (N. Y.).

Authorities on this subject are much divided. In *People v. Rauscher*, 119 U. S. 407, it was held that a person extradited from Great Britain for murder of a seaman could not be tried for the statutory offence of cruel and inhuman punishment of the same seaman. The New York court distinguish that case on the ground that it would have been a violation of good faith for the United States to try the prisoner for an offence not within the extradition treaty with Great Britain; and such a course, moreover, was expressly forbidden by Act of Congress. The court suggest that a different rule applies as between States, their mutual obligation to surrender criminals springing from a provision of the United States Constitution (art. 4, § 2), which expressly includes all crimes. In the case at bar no principle of comity was violated, because the State from which the prisoner was brought had already held the same doctrine as that now laid down for New York.

CRIMINAL LAW — WRIT OF ERROR — ABATEMENT BY DEATH. — O, having been convicted of murder, brought error; after argument and before judgment O died. *Held*, that the writ of error abated; and also that the court could not enter judgment *nunc pro tunc*, because the only subject-matter on which judgment could operate had ceased to exist. *O'Sullivan v. People*, 32 N. E. Rep. 192 (Ill.).

This is in accordance with the only case directly in point (53 Ga. 552), and with Mr. Bishop's conjecture in 1 Crim. Proc. § 1363. In civil cases, and in England where a criminal conviction works attainer, the opposite rule obtains.

EQUITY — MISREPRESENTATION — PROSPECTUS OF COMPANY. — B signed a printed form issued by the promoters of an intended company, expressing his willingness to become a member of the council of administration of the intended company. Soon afterwards, when the scheme had been more fully matured, the promoters issued a prospectus,

In which the company was described as "to be incorporated under the Companies' Act;" an extract was also given from the proposed articles of association to the effect that there would be a council of administration of members of the company, and a list of members of the council was appended, containing the name of B. This was done on the one hand without any further communication with B, but on the other without any withdrawal having been made by him of his name. B afterwards refused to have anything to do with the scheme. Plaintiff, who bought shares on the faith of the statement in the prospectus, brings a bill to have his name stricken from the list of contributors, and to have his money refunded. *Held*, that the effect of the statement in the prospectus was not merely that B had expressed his willingness to become a member of the council, but that he had authorized the publication of his name as a member, and as such was a false statement of fact. Decree for plaintiff. *Karling's Case*, [1892] 3 Ch. 1 (Eng.).

GUARANTY — APPLICATION OF COLLATERAL. — A debt payable in instalments was secured to its whole amount by insurance policies on certain buildings for the benefit of the creditor, and also by the guaranty of a third person for the part first due. *Held*, that the creditor had a right to hold the insurance money paid when the buildings were burned, as security for the part of the debt not covered by the guaranty, although not yet due, and that the guarantor was liable for the unpaid instalments covered by his guaranty. *Kortlander v. Elston*, 52 Fed. Rep. 180 (C. Ct. of App., Sixth Circuit).

QUASI-CONTRACTS — ACTION AT LAW TO ENFORCE TRUST OF MONEY — PAROL EVIDENCE. — Plaintiff conveyed money to his father, defendant's testator, by a deed absolute on its face; but there was an oral understanding that the testator should hold for safe keeping only, and subject to plaintiff's demand. *Held*, in an action of law, in the nature of a count for money had and received, that plaintiff could prove these facts by parol evidence. *Minchin v. Minchin*, 32 N. E. Rep. 164 (Mass.).

Defendant objected that this was varying a deed by parol evidence. The court say that the action is in effect brought to enforce an express trust of money; that as the right is really equitable, the rules of equity in regard to the admission of evidence ought to prevail; and that equity does not regard such evidence as varying the deed, but as setting up an equitable title not inconsistent with the legal title passed by the deed. An action at law would, of course, not have lain at all (*Davis v. Coburn*, 128 Mass. 377) if there had been a trust account still remaining open in any proper sense. Here by express agreement the trust terminated, and the trustee became liable to redeliver the *res*, upon a simple demand by plaintiff.

REAL PROPERTY — CONSTRUCTION OF RAILROAD — OVERFLOWING LANDS. — A railroad company constructed a ditch which diverted a large quantity of surface water from the direction in which it naturally flowed, and turned it into a watercourse which was thereby made to overflow plaintiff's land. *Held*, that railroad companies acquire no greater rights than individuals, and therefore defendant was liable for the damage done to plaintiff. *Staton v. Norfolk & C. R. R. Co.*, 16 S. E. Rep. 181 (N. C.).

The weight of authority seems to be that the railroad purchases once and for all the right to operate its road, and that it is not liable for subsequent damage arising from works carefully constructed in the course of the operation of the road, although such a result could not have been foreseen when the damages were assessed. *Lewis*: Eminent Domain, §§ 564 *et seq.*

REAL PROPERTY — DOWER — DEDICATION. — Plaintiff's husband conveyed land to defendant for a right of way, plaintiff not joining in the deed. In an action for dower, it was *held* (1) that a railroad is a public highway, though operated for profit, and that land acquired by it for a right of way, either by voluntary deed as here, or by the exercise of the right of eminent domain, is dedicated to public uses; (2) that the grantor's widow has no right of dower in land dedicated to public uses. *Black, J., dissents. Venable v. Wabash Western R. R. Co.*, 20 S. W. Rep. 493 (Mo.).

This is the first case in Missouri to decide this point.

REAL PROPERTY — JOINT TENANCY FOR LIFE WITH REMAINDERS SEVERALLY IN FEE. — A testator gave real and personal estate to trustees in trust for his "nephews J., T., and G., and for their respective heirs, executors, administrators, and assigns." *Held*, that the nephews were joint-tenants for their lives and the lives of the survivors and survivor, with several remainders in tenancy in common in fee. *In re Atkinson-Wilson v. Atkinson*, [1892] 3 Ch. 1 (Eng.).

This is a very curious case, which can be traced back to Lit. § 283, and which is the outcome of the limited application of the rule in *Shelley's Case*, and of the presumption of joint-tenancy. The result is worked out as follows:—

I. *Shelley's Case*. — "Heirs" cannot be a word of limitation, but must be taken as

a word of purchase, except when it is used as designating the heirs of the one, or, where two, the heirs of the two between them begotten, to whom the immediate estate is given. Thus, if an estate is given to a woman and the heirs of her and A B (as distinguished from the case where an estate is given to her and A B and the heirs of their two bodies), she takes, not an estate tail, but merely an estate for life. *Per* Wilmot, C. J., in *Frogmorton v. Whaney*, 2 W. Bl. 728, 731. See *Feame C. R.* 38; 2 *Jarm. Wills* (4th ed.), 340-343.

II. Suppose, then, an estate be given to two *men*, A and B, and to the heirs of their two bodies begotten. By the presumption of joint-tenancy this gives an immediate joint estate to A and B; but heirs of the bodies jointly of A and B, who are the takers of the immediate estate, is an impossibility; "heirs of their two bodies begotten" is, therefore, interpreted as meaning the heirs begotten by each of them of his body by any wife. But then "heirs" cannot be taken as a word of limitation (*supra*), but A and B are held to have a joint estate for the term of their two lives, with remainders severally to their heirs as tenants in common. Lit. § 283.

Now, if the land is given to "A and B and their heirs," the case is held not to differ, for A and B have the immediate interest in joint-tenancy, and as "heirs" is clearly not intended to be restricted to such persons as may be the heirs of both jointly, the rule in *Shelley's Case* does not apply. A and B have a joint life estate as above, with inheritances severally to their heirs general as tenants in common.

III. Then, to come to the present case. "*Respective*" put before "*heirs*" is held in no way to change the situation, for it merely makes the *inheritances* several as *they were before*, and does not affect the joint holding of A and B.

It will be seen that the keystone of the reasoning is the joint holding of A and B. The case seems, therefore, to have no application in jurisdictions where the presumption of joint holding is changed, or where such language is used as to rebut the presumption. *Ex parte Tanner*, 20 Beav. 374 (*semble*), where the Master of the Rolls says, if the wording were "to A and B and the heirs of their bodies respectively," instead of "A and B and their respective heirs," A and B would take as tenants in common in tail.

REAL PROPERTY — RIGHT TO LATERAL SUPPORT. — A municipal corporation, in the course of grading a street, negligently made excavations so that the lateral support to the land of the abutting owner was removed, the soil was caused to slide into the street, and the buildings situated on the land were damaged. Held, that the city was liable (1) for the damage to the soil, and (2) for the damage to the buildings, since the weight of the buildings did not contribute to the caving in of the soil. *Parke v. City of Seattle*, 31 Pac. Rep. 310 (Wash.).

The court cites, and expressly dissents from, *Dillon, Municipal Corporations*, § 991, where it is said that "the abutting owner has, as against a city, no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time," and follows *Keating v. Cincinnati*, 38 Ohio St. 141, and *Stearns' Ex'r v. City of Richmond*, 14 S. E. Rep. 847 (Va.).

TORT — ANIMALS KILLED ON RAILROAD. — In a recent case in Massachusetts it is said that "the mere fact that the plaintiff's horse escaped from his control, and passed through the gate of the defendant's tracks, did not make him a trespasser so as to preclude the plaintiff from recovery." *Taft v. New York P. & B. R. R. Co.*, 32 N. E. Rep. 168 (Mass.).

While it is clear that such a fact should not, of itself, preclude recovery, it is not equally clear that the inability of the master to control his horse will prevent the latter from becoming a trespasser if he enters on the premises of a stranger. The language may, however, be explained on the ground that the court is trying to avoid the consequences of the unfortunate decision in *Maynard v. B. & M. R. R.*, 115 Mass. 458.

In Massachusetts the leading case of *Holmes v. Drew*, 151 Mass. 578, has been properly criticised, and can only be supported on the ground that there was an implied invitation, — an assumption not sustained by the facts. Nor is the decision in *Sweeney v. Old Colony &c. R. R.*, 10 Allen, 368, altogether satisfactory, though it is far less objectionable than the verdict of the jury. A clear distinction should be made between a recovery on account of the condition of the premises and a recovery based on the application of actual force to the person of the trespasser or licensee.

TORT — CARRIER OF PASSENGERS — LIABILITY TO TRESPASSER. — Plaintiff was stealing a ride on defendant's train, when defendant's brakeman saw him and ordered him to get off. Plaintiff protested that the train was moving too rapidly; but the brakeman insisted, and threatened to throw plaintiff off if he did not immediately jump from the train. Plaintiff jumped, and fell under the cars, sustaining severe injuries.

Held, plaintiff could not recover, because he was guilty of contributory negligence in being on the train when he knew he had no right there; for it was his consciousness of having done wrong that made him fear the brakeman's threats, and caused him to jump from the train. *Planz v. Boston & Albany R. R.*, 32 N. E. Rep. 356 (Mass.).

It is submitted that the injury here was the result of a wilful, not of a negligent, act of the defendant's servant; negligence of the plaintiff was therefore entirely immaterial. Beach, Contrib. Negligence, § 22. Moreover, if the defendant wrongfully compelled the plaintiff to adopt a perilous alternative, he was responsible for the consequences, even if the plaintiff, in his terror, made a reckless choice. Beach, Contrib. Negligence, § 14. The court's reasoning as to the causal influence of the plaintiff's conscience is decidedly novel.

TORT — DANGEROUS PREMISES — INJURIES TO MERE LICENSEE. — *Held*, that a statute which gives the members of a fire patrol the right to enter buildings exposed to fire, does not give them any greater rights than those of mere licensees. *Held*, also, that where a fireman enters a building by reason of such statute, and is injured while using an elevator so constructed as to show it is intended for freight, he cannot recover, for there is no implied invitation to use the elevator. *Gibson v. Leonard*, 32 N. E. Rep. 182 (Ill.).

The decision in this case is undoubtedly correct, for the license was given by law, and there was no enticement, allurement, or invitation on the part of the owner of the building.

The authorities on the general subject of the duty of care towards licensees are in confusion. In *Indemaur v. Dames*, L. R. 1 C. P. 274, there was a legal "invitation," though in ordinary speech one would say the plaintiff had entered the sugar refinery "on business." And on the other hand there is the case of *Southcote v. Stanley*, 1 H. & N. 247, in which it was held that no "invitation," legally speaking, was extended to the plaintiff, who had come as a "visitor" of the defendant.

TORT — EXTRAORDINARY CARE — ELECTRIC RAILROAD. — In an action against an electric street railway company for personal injuries sustained by the plaintiff while a passenger in one of the company's cars, the judge charged the jury that the defendant was liable if the injury could have been avoided by extraordinary care and vigilance on the part of the defendant, its agents and employees. *Held*, that the instructions were unexceptionable; that an electric railway company should be held, not merely to the degree of care required of horse-railway companies, but to the extraordinary degree of care which is required of steam-railroad companies. *Cogswell v. West St. &c., Electric R. R. Co.*, 31 Pac. Rep. 411 (Wash.).

TORT — MUNICIPAL CORPORATION — LIABILITY FOR NEGLIGENCE OF OFFICER. — Plaintiff was imprisoned in the workhouse to work out a fine imposed for infraction of the city ordinance, which was enacted by virtue of power given by the city charter. While there, acting under orders of the workhouse superintendent, he was kicked by a mule, known to be vicious, which he was attempting to harness. *Held*, that the defendant city was "simply in the exercise of its governmental functions, and not liable for the negligence of its officers." *Ulrich v. City of St. Louis*, 20 S. W. Rep. 467 (Mo.).

TORT — STREET RAILWAY — ADVERTISING ATTRACTIONS. — Defendant, a street railway company, owned a pleasure resort to which it ran cars, and published a description of the grounds and attractions, stating that a roller-coaster was being built there. *Held*, that the plaintiff could not recover against defendant for injuries caused by negligence of the owner of the roller-coaster. Defendant's granting to the owner of the coaster permission to operate a coaster, which in itself was not dangerous, was not negligence, nor did his advertisement make him liable. *Knottnerbus v. North Park St. Ry. Co.*, 53 N. W. Rep. 529 (Mich.).

TORT — TELEGRAM — MISTAKE. — Plaintiffs were damaged by the negligence of defendant's agent in substituting the figures "47" for "27" in an unrepeatable message. The message was written on a blank, with the stipulation upon it that the company would not be liable for damages caused by mistake, unless the message was repeated. *Held*, that this stipulation was void. Overruling *Lussiter v. Tel. Co.*, 89 N. C. 334; *Brown v. Postal Telegraph Co.*, 16 S. E. Rep. 179 (N. C.).

TRUST, SPENDTHRIFT — LIABILITY OF INCOME TO EXECUTION. — A, by will, gave property to trustees in trust for a son of A, with remainder to the trustees. The trustees were directed to invest the money and rent the land, and "to use the rents and interest for support of the son during his life, making quarterly payments to him until death." *Held*, that the interest of the beneficiary to the extent of his comfortable sup-

port and maintenance, according to his condition in life, was not liable to seizure for his debts. But any accumulation above the sum needed for the beneficiary's support is liable for his debts. *Leigh v. Harrison*, 11 So. Rep. 604 (Miss.).

This is an extraordinary decision. Even admitting the soundness of the doctrine of so-called spendthrift trusts, the decision in this case goes further in three respects. 1. The direction in the will to pay over the whole income was absolute, and not discretionary, as in *Nichols v. Eaton*, 91 U. S. 716, the case cited as the chief authority for the decision; nor was it a direction to provide for the maintenance of the son, as in *Re Bullock*, 54 L. T. N. S. 736. The will contained no direction that the income should not be liable for debts, as in *Fisher v. Taylor*, 2 Rawle, 33. 3. The decision was reached, notwithstanding a provision in the code that estates of any kind held for another "shall be subject to like debts and charges of the person to whose use" they are held, as they would have been if the person had owned a like interest therein "as he may own in the uses or trusts thereof."

REVIEWS.

THE HISTORY OF THE DOCTRINE OF CONSIDERATION IN ENGLISH LAW (Yorke Prize Essay for 1891). By Edward Jenks, M. A. London: C. J. Clay & Sons. 1892.

This little book is very suggestive, and well worth the attention of any one who cares for the history of the law. The first chapter (by means of twelve canons) gives a statement of the condition of the law at the present day. A desire to be methodical leads to the mistake here of introducing as canons what should be treated as exceptions rather than independent and co-ordinate principles. It is rather surprising to read at the outset a defence of the theory that consideration may be regarded as a benefit conferred on the promisor, and that consideration to-day is a matter of procedure rather than of substantive law. Indeed, the latter statement is subsequently contradicted.

The next two chapters treat of the law during the time of the Abridgments and earlier; while the last chapter is a chronological recapitulation down to the present day.

In brief, Mr. Jenks states that the action of assumpsit developed from actions of tort through the action on the case; and that the *breach* was the prominent feature, — not the *undertaking*, which was treated merely as an incident. The necessity of consideration was carried over from the action of debt, and grew from a mere point in procedure to an essential element of the contract. "On the whole," he says, "the great interest of the subject lies in the fact that it affords perhaps the best instance in the domain of legal biology of an unconscious adoption of a rudimentary and apparently casual organ to important and complex purposes."

G. R. P.

UNITED STATES CIRCUIT COURT OF APPEALS, Vol. I. St. Paul: West Publishing Co., 1892.

This series of reports covers the same ground as the official series published by Banks & Brothers. The reports and headnotes are made by the "Editorial Staff of the National Reporter System." How they compare in accuracy and completeness with the authorized reports only a detailed examination would show. The volume is rather cheaply got up, with narrow margins and small type.

N. H.

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THE "PAROL EVIDENCE" RULE.

I.

FEW things in our law are darker than this, or fuller of subtle difficulties. It appears to me that the chief reason for it is that most of the questions brought under this rule are out of place; it is true, in a very great degree, that a mass of incongruous matter is here grouped together, and then looked at in a wrong focus. Because the rule deals with *evidences*, with writings, — things the nature of which it is to be evidence of what they record, — it is assumed that it belongs to the law of evidence. But in truth most of the matters with which it is concerned have nothing to do with the law of evidence. It heightens the confusion, however, to find that some of them do belong there.

How, then, shall one find his way out of these perplexities? By coming to some clear conception of what the law of evidence is; by eliminating those parts of the subject which do not belong under that head, and allotting them to their proper place; and by tracing the development and true proportions of what remains. Let me try, although very imperfectly, to help a little towards accomplishing this result.¹

I. It is necessary to keep in mind a few discriminations. 1. Between rules of substantive law and rules of evidence. When the

¹ For an attempt to indicate the nature of the law of evidence, the reader is referred to 3 Harvard Law Review, 142-7, and Thayer's Cases on Evidence, 1-4.

law requires a thing to be recorded, or to be in writing or under seal, or attested by witnesses, these are provisions of the substantive law; they are not requirements of the law of evidence. These are matters of form required in some cases as necessary to the constitution of a thing, in some required in order that it may be available as the ground of an action, and in some that it may be provable. In either case they belong to the substantive law of the particular subject. When, therefore, testimony or facts offered in evidence are rejected as not conforming to any one of these or the like requirements, it is the substantive law of the case that excludes them.¹

2. We must, therefore, discriminate between different senses in which the word "evidence" is used. In the sense which gives name to the great and quite peculiar department of law which is known among English-speaking people as their "law of evidence," this word means testimony, or some matter of fact regarded as a thing to be offered to a legal tribunal as a basis of inference in ascertaining some other matter of fact. It does not include all that relates to the general topic of proof or legal reasoning, or all that is popularly meant by the word "evidence,"—all evidential matter,—but only such as it is necessary to offer for use in court when a tribunal has to ascertain a matter of fact unknown or disputed. The rules of evidence regulate this particular judicial function. They do not determine questions of mere logic or general experience, or furnish rules for conducting processes of reasoning. To talk of evidence, then, and to settle questions about it, in the mere sense of a logically probative quality, is not to touch upon the region belonging to the law of evidence; indeed, to talk of it at all, unless with reference to its use for the purposes of litigation, is not to talk of what belongs to this specific department of our law. When we speak of certain writings as "evidences of debt," or of ownership, or of writings generally as "written evidence," and what is not in writing as "extrinsic evidence" or "parol evidence," we are, for the most part, not using the word "evidence" in any sense apposite to the law of evidence. Is it this head of the law that makes a bond or negotiable paper or other writing to be an evidence of debt, or a bill of lading evidence of ownership? Is it the law of evidence which requires a

¹ I found my judgment on one of the most useful rules in the law, viz., that when parties have put their contract into writing, that writing determines what the bargain is. — *Martin, B.*, in *Langton v. Higgins*, 4 H. & N. 402.

will, or a deed, or a contract about land, to be in writing? And is it the law of evidence which is appealed to in determining all the various implications and corollaries of these requirements? — as, *e. g.*, in deciding when the parol or extrinsic matter submitted is or is not consistent with the rule that you must have a specialty, or that what you rely upon shall be *intrinsic* in the writing?

3. Furthermore, it is necessary to remember in a thousand cases, when it is said that "evidence is admissible," or the reverse, that this "admissibility" has no necessary relation to the law of evidence. For in such cases the admission or rejection of what is offered rests, far oftener than not, on different grounds. It may turn on a doubt as to the mere logical quality of what is offered, or as to the true limits of the governing propositions of substantive law, pleading, or procedure, which in every case must fix the character of what is put forward as being relevant or the reverse. Neither of these situations presents a question in the law of evidence. If the inquiry be merely whether a matter admitted to be logically probative is excluded by any general rule from being used in court as a basis of inference, then you have a question in the law of evidence. But our books are full of statements and decisions that certain evidence is or is not admissible, which, if justly analyzed, are merely enunciations of a conclusion of logic or general experience, or of the substantive law in its various branches, or of the law of pleading or procedure.

Where a declaration as to the admissibility of evidence is clearly not an assertion as to a point in substantive law, pleading, or procedure, it is very often merely a single specimen, out of myriads that might be offered, of probative matter *not* excluded by the law of evidence. Such propositions are often put as if they declared a rule or doctrine in the law of evidence. When Wigram, in his well-known treatise on the "Admission of Extrinsic Evidence in Aid of the Interpretation of Wills," says, in his fourth proposition, that in order to aid in deciphering a will, etc., "the evidence of persons skilled in deciphering writing . . . is admissible to declare what the characters are," and in the fifth proposition that "for the purpose of determining the object of a testator's bounty . . . the court may inquire into every material fact," etc., he is not laying down any rule in the law of evidence, he is merely *illustrating* the subject by showing that the law of evidence has no precept about it. And generally, as regards this valuable little book, which is widely supposed to contain a considerable number of rules of evi-

dence, the real truth is that while it lays down some rules of construction, it points out that there is but one single rule of evidence involved in the whole discussion; namely, that which is stated in its proposition vi., with the exceptions in proposition vii.¹ Little reflection is needed to see that such things, *mere instances of what is provable*, are but so many illustrations and applications of the fundamental conceptions in any rational system of proof; namely, that what is logically probative and at the same time practically useful may be resorted to, unless forbidden by some rule or principle of the law. These instances may be multiplied and heaped up in countless numbers. They are, in fact. And yet he who does this is merely illustrating, often with a benumbing superfluity, the practical working of the principles of reasoning or the law of evidence; he is not stating these principles or rules.

4. Again, it is important to notice that rules which declare *the effect* of probative matter do not belong to the law of evidence. For example, when it is declared that certain facts create an estoppel, or that, as evidence, they are conclusive, or that they make a *prima facie* case, or create a presumption, such propositions amount to saying that, as regards this or that specific question, such and such facts are legally equivalent to certain others, either absolutely or *prima facie*. This may be so either for the purposes of the substantive law or of the law of procedure. Of course if such is their legal effect, then the proof of them is, for the given purpose, tantamount to the proof of the facts that they stand for.² One may get an exact notion of the use of rules of presumption in their relation to evidence by observing Lord Blackburn's handling of the case of *Anderson v. Morice*.³ Compare Lord Coleridge's opinion in *Ogg v. Shuter*,⁴ where the case is discussed merely upon a balancing of the evidence.

¹ "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended. . . . Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i. e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." As to Wigram's meaning when he speaks of proving intention, see sections 9 and 10 of his book.

² See 3 *Harvard Law Review*, 141.

³ L. R. 10 C. P. 614.

⁴ L. R. 10 C. P. 159.

The statement, then, that anything is conclusive evidence is not one for which the law of evidence is responsible. It may be a thing very important to be known in handling evidence, but in that respect it is not essentially different from the ordinary rules of substantive law and procedure governing the particular case.

5. Another discrimination to be observed is that between documents which *constitute* a contract, fact, or transaction, and those which merely certify and evidence something outside of themselves,—a something valid and operative, independently of the writing. Brunner, in a learned consideration of the subject of "Documents," has incidentally pointed out this discrimination with precision while speaking of documents in the old Italian law, and of their nomenclature,—(1) *carta* or *cartula*, and (2) *notitia* or *memoratorium*. He quotes¹ a Lombard document of the ninth century which sets forth a promise *per wadium* to give by a *carta* a piece of land in exchange; and goes on to remark that by the Lombard law a binding contract is concluded by the giving of the pledge (*wadia*);² and that as regards the legal effect of the transaction, the giving of a document is unimportant. The document in such cases is only written testimony of a transaction already valid and complete without it. It is merely an evidence document. "The *carta*, on the other hand, has a twofold office. It is both a means of proof and a means of constituting the transaction which it authenticates. It is used in legal matters which are accomplished only by means of the document. As constituting the contract, it takes the place of the *wadia*; as authenticating the contract, it unites with the function of the *wadia* that of the *notitia*." Such documents, he adds, are called "dispositive." "The *carta*, as contrasted with the mere evidence document, is a dispositive document."

This distinction finds abundant illustration in our own law, old and new. In 1422³ a plaintiff sued in account for money received to his use; the defendant pleaded that he had given a deed to the plaintiff testifying the receipt of the money, and insisted that the plaintiff must make profert of the deed. Babington, J., at first seemed to agree with the defendant, on the ground that otherwise the plaintiff might recover twice by suing again on the deed; and he put the case of one owing twenty pounds on a simple contract,

¹ Urkunden, 15-17. See "The Early History of Negotiable Instruments," 9 L. Quart. Rev. 70.

² See Essays in Anglo-Saxon Law, 190.

³ Y. B. 1 H. VI. 7, 31; Fitz. Acc. 1; *semble* s. c. Y. B. 2 H. VI. 9, 5.

and afterwards making a bond for the same twenty pounds (*sur le contract*); such a one, he said, shall be discharged from the contract by the obligation; and if an action be brought afterwards on the contract he may plead that for the same contract and the same money the plaintiff has a bond; and the reason for this, he said, was because otherwise a man would be twice charged for the same debt. Rolfe, counsel for the plaintiff, in answer put the case of lending a horse by an indenture, and afterwards bringing an action of debt on the loan without showing the indenture; clearly, he said, the borrower has no such plea as this, that the lender has an indenture on the same contract, because the indenture *merely testifies the contract*, and so in this case the deed merely testifies the receipt. "As to the case you put," he goes on, "of a bond, I entirely agree; for the contract and the obligation are two different contracts, and by the greater I am discharged from the less. But in the case of the receipt and the deed which witnesses the receipt there is but one contract."¹ In 1460,² on occasion of a question put to the judges by the Recorder of London, it appeared that one had sued in debt for a sale of cloth, and the defendant would wage his law; upon which the plaintiff set up a custom of London that the defendant should be ousted of his law if the plaintiff put forward "a paper or parchment written and sealed with the defendant's seal, which proves the contract." The plaintiff did make profert of such a paper, testifying that the defendant had agreed to the contract. Laken, serjeant, said that the action should have been brought on the paper, and not on the contract; but Prisot, C. J., thought otherwise. "The contract," he said, "is not determined by this. It is determined where one makes a bond upon a contract, or if a man recovers in debt upon a contract. Here no bond is shown, but only a paper testifying the contract. If I bail goods by deed indented," he added, "and afterwards bring detainue for them, I am not to count on the indenture, for that is only a thing testifying the bailment. It is the same if I make a contract by deed indented. I shall not be compelled to count on the indenture; for the contract is not determined upon (*sur*) the indenture, but con-

¹ Compare Newton, C. J., in 1444, at the end of a case in Y. B. 22 H. VI. 55, 32: "If one buy a horse of me for ten pounds, and deliver me a bond for ten pounds for the contract, it is a good bar in an action of debt, and, as regards the debt, is as strong as a release for all manner of actions."

² Fitz. *Dette*, 68, s. c. Y. B. 39 H. VI. 34, 46 (ed. 1689). Some older editions of this year book omit important parts of the case.

tinues, and a man may elect how he will bring his action." "To which," adds the reporter, "all the justices agreed."¹

Whenever, therefore, the law requires, in any transaction, a formal document, the *carta*, it is demanding something more than written evidence; it is making *form* necessary,—as when a seal to a deed is required, or three witnesses to a will. As there is no will without the witnesses, and no deed without the seal, so the *carta*, and no part of it, can exist outside of the writing. And yet, from the nature of it, this sort of writing is also evidence,—as they used to say, it "testifies;" being in this respect different from the seal and witnesses.

As contrasted with this sort of thing, it is a *notitia*, a *memoratorium* only, that is called for when the English Statute of Frauds, in §§ 4 and 17, is content with "some note or memorandum in writing" of the agreements there referred to.²

II. Leaving, now, these discriminations, and coming to the precept itself, which goes by the name of "The Parol Evidence Rule," it is ordinarily said that in the case of contracts in writing, wills, deeds, and other solemn documents, parol evidence is not admissible to vary or add to their legal effect or to cut it down; and especially it is said that such evidence of the writer's intention is not admissible. In this expression, "parol" means what is extrinsic to the writing, and "evidence" means testimony or facts conceived of as tending to show what varies, adds to, or cuts down the writ-

¹ It seems that one might count upon the specialty if he chose, and it "could not be disputed, unless by matter of as high a nature." Fitz., *Barre*, 19; s. c. 18 H. VI. 17, 8 (1439).

In 1522-1523 (Y. B. 14 H. VIII. 17, 6), in a long and interesting case, Brudnel, C. J., said: "Things which pass by parol are made subject to a condition, as well by parol as in writing; . . . for a deed is only proof and testimony of the party's agreement. As a deed of feoffment is only proof of the livery; the land passes by the livery, but when the deed and the livery coexist, it is a proof of the livery." Compare Saunders, J., in considering a deed of lease of land, in *Throckmerton v. Tracy*, Plowden, p. 161 (1556): "And he said he was of the like opinion that Brudnel seemed to be of in 14 H. VIII., that contracts shall be as it is concluded and agreed between the parties, according as their intents may be gathered. . . . And certainly the words are no other than the testimony of the contract."

² "The contract itself, and the memorandum which is necessary to its validity under the Statute of Frauds, are in their nature distinct things. The statute presupposes a contract by parol. . . . The contract may be made at one time, and the note or memorandum of it at a subsequent time."—*Hoar, J.* (for the court), in *Lerned v. Wannemacher*, 9 Allen, 412. That the "validity" of the contract is not touched by statutes like the English one, but only the remedy, see *Townsend v. Hargrave*, 118 Mass. 325; *Maddison v. Alderson*, 8 App. Cas., p. 488 (*per* Lord Blackburn).

ing, or to show the intention. The phrase parol or extrinsic evidence stands contrasted with that intrinsic evidence which is found in the writing itself. A careful scrutiny of the cases appears to show that the rule is aimed, not so much against offering evidence of anything, as against the thing itself that the evidence is offered to further; it is the varying, adding, and cutting down that is condemned, the trying to give to matter not in writing an equal effect and operation with that which has the written form; or, to speak more generally, the trying to give to matter which is not formal an equal effect with that which is formal,—as being recorded, or under seal, or witnessed, or merely written, whether the form be required by law, or merely by convention of the parties. There are questions relating to construction and to matters offered in aid of construction which I reserve for another article.

Let me illustrate these suggestions by considering their application to some well-known classes of cases.

1. Of recorded judgments it is said¹ that they cannot be "contradicted, added to, or varied by oral evidence." This appears to be only another mode of expressing the doctrine of the conclusive and binding quality of domestic judgments,² as regards all who appear upon the record to be parties and to be subject to the jurisdiction. Of the nature, and some of the limitations of this doctrine, a clear impression may be got by looking at two or three cases.

In a case where the defendant had pleaded to an action of debt on a judgment in the Court of Common Pleas, in another county, that at the time of the supposed service of the original writ on him, he was not and never had been an inhabitant of the commonwealth, had had no notice, and had not appeared to defend, the plaintiff demurred, and the plea was held bad: "The judgment declared on cannot thus be impeached collaterally by plea. . . . A writ of error lies to reverse the judgment, if erroneous. But until reversed it must be taken to be conclusive."³ As to the scope of the general doctrine about the effect of judgments, it has been further said that, "when the cause is within the jurisdiction of the court, but the proceedings are based upon a defective writ, or are prosecuted without service of process, or notice upon the party to be affected, the objection is no more fatal to the jurisdiction and power of an

¹ Stephen, *Dig. Ev.*, art. 90.

² "As a plea, a bar, or as evidence, conclusive," etc.—De Grey, C. J., in the *Duchess of Kingston's Case*, 20 St. Tr. 537, *note* (1776).

³ *Cook v. Darling*, 18 Pick. 393.

inferior court than it is to one of general jurisdiction. In such cases a judgment in another State, even of a court of general jurisdiction, may be impeached by plea and proof, upon the ground of a want of jurisdiction of the person in the court rendering the judgment, *Carleton v. Bickford*, 13 Gray, 591. Domestic judgments, however, cannot be thus impeached collaterally by the parties thereto; not because of an apparent authority in the court to render the judgment, but because the remedy by review or writ of error is held to be more appropriate."¹ In *Needham v. Thayer*² the doctrine of *Cook v. Darling*³ was overruled, as regards the particular ground of impeachment there set up, on the view that this was required by the Fourteenth Amendment to the Constitution of the United States; it was held that a defendant in an action of contract on a domestic judgment might plead and prove that he was not a resident of the State when the writ was served, and that he had no notice of the suit until the beginning of the present action. The case came up on exceptions to a ruling of the trial judge rejecting evidence of these facts. It was held that the evidence should have been received: "We are of opinion that [the defendant] had the right to impeach the judgment by proof of these facts." In other words, those facts were a good defence.

Qualifications of the doctrines above stated as governing in the case of domestic judgments, are recognized as applying in the case of judgments of other states of the American Union, notwithstanding the provision of its Constitution (Art. 4, s. 1) that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and to the acts of Congress passed in pursuance thereof.⁴ In *Carleton v. Bick-*

¹ Wells, J. (for the court), in *Hendrick v. Whittemore*, 105 Mass. 23.

² 147 Mass. 536.

³ *Supra*.

⁴ "These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. *D'Arcy v. Ketchum*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457. And they confer no new jurisdiction on the courts of any State, and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred. *Wisconsin v. Pelican Ins. Co.* [127 U. S. 265], above cited.

"Nor do these provisions put the judgments of other States upon the footing of domestic judgments, to be enforced by execution, but they leave the manner in which

ford,¹ in an action on a judgment of the Court of Common Pleas of New Hampshire, it appeared that the sheriff's return was recited in the judgment, showing personal service on the defendant. The defendant offered evidence contradicting this, and it was rejected. On a case reserved, the Supreme Judicial Court of Massachusetts held that it should have been received, on the ground that in such an action the defence is open that the court rendering the judgment had no jurisdiction of the defendant's person; and this, although the judgment recited the existence of the facts necessary to give it jurisdiction. And so it was held in *Thompson v. Whitman*.²

This slight statement of some doctrines relating to the effect of judgments and the way of impeaching them is sufficient for the present purpose. These are rules of the substantive law of judgments.³ Yet it is common to attribute them to the law of evidence, and to express them by saying that the record is conclusive evidence, and that extrinsic evidence is not admissible to contradict it, and the like; as when in *Wilcher et al. v. Robinson*,⁴ the court says:—

"If it be a judgment . . . of a domestic court of general jurisdiction, and the record declares that notice has been given, such declaration *cannot be contradicted by extraneous proof*. . . . The judgment . . . is sustained, not because a judgment rendered without notice is good, *but because the law does not permit the introduction of evidence* to overthrow that which for reasons of public policy it treats as absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection."

they may be enforced to the law of the State in which they are sued on, pleaded, or offered in evidence. *McElmoyle v. Cohen*, 13 Pet. 312, 325. But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they were rendered, denies to the party a right secured to him by the Constitution and laws of the United States. *Christmas v. Russell*, 5 Wall. 290; *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Insurance Co. v. Harris*, 97 U. S. 331, 336; *Crescent City Co. v. Butchers' Union*, 120 U. S. 141, 146, 147; *Carpenter v. Strange*, 141 U. S. 87."—Gray, J. (for the court), in *Huntington v. Attrill*, 146 U. S. pp. 685, 686,—a clear and powerful opinion upon an intricate subject.

¹ 13 Gray, 591.

² 18 Wall. 457.

³ Such rules as have lately become the subject matter of a large and interesting treatise, *Van Fleet on the Law of Collateral Attack on Judicial Proceedings*. Callahan & Co., Chicago, 1892.

⁴ 78 Va., p. 616.

The truth is that a certain defence, or answer to a domestic judgment is denied. There is a denial of the right to qualify the full verity and operation of such judgments, collaterally, as the phrase is. *If this defence or answer were allowed*, the evidence would be received. In a suitable direct proceeding, as by a writ of error or a motion to vacate the judgment, there is the right to ask the court that gave the judgment to annul it; and in such proceedings, where the facts impeaching the judgment are available, nobody ever heard that extrinsic evidence to prove the facts was not admissible. And so in any proceeding before any court, wherever such facts are in point of substantive law available, it is a mere matter of course that extrinsic evidence of them is admissible; as in several of the cases cited above.¹

2. In *Bates v. Tymason*,² in an action for the breach of covenants in a deed, there was a question as to the true boundary of the estate conveyed, and a witness for the plaintiff (his grantor) was allowed to state what was said by the defendant, the original grantor, to be the true boundary, during the negotiations for his own purchase from the defendant. The defendant objected to the "parol evidence," but it was admitted in the Supreme Court. The case ultimately reached the Court of Errors,³ and the decision was reversed; the chancellor (Walworth) remarking that the question was not what land Tymason intended to convey to May, but what land is covered by the description in the deed: "It is impossible for me to discover upon what principle May's testimony could be received as legal evidence to support the plaintiff's action. . . . Our recording Acts would afford no protection whatever to subsequent purchasers if the abutments and boundaries contained in written conveyances should be considered as referring merely to what was supposed by the immediate parties to be the land described in the deed."

In such a case as this it is not the law of evidence that is applied, but the law of deeds; you cannot in effect add to a deed matter which has not the required form of a deed. In speaking of this as "parol evidence" it is in contradistinction to the deed itself, as being "written evidence." The requirement of a deed, and that deeds shall be in writing and duly executed, carries with it by im-

¹ *Carleton v. Bickford*, 13 Gray, 591; *Thompson v. Whitman*, 18 Wall. 457; *Needham v. Thayer*, 147 Mass. 536. See the interesting case of *Denton v. Noyes*, 6 Johns. 294; compare *Post v. Charlesworth*, 21 N. Y. Suppl. 168.

² 13 Wend. 300 (1835).

³ 14 Wend. 671.

plication the rejection of anything extrinsic which is sought to be made operative as if it were in the deed. The difficulty is that the object for which the evidence is offered is illegitimate.

3. It is the Countess of Rutland's Case¹ that is so often cited to the rule that "parol evidence is not admissible to vary or add to a writing." But that case as regards this subject merely laid down a rule in the law of fines as to the declaration of the uses of fines; namely, the doctrine briefly stated in *Jones v. Morley*,² that if the fine be levied pursuant to a covenant declaring the uses, one cannot set up an intervening oral declaration of uses, or deny that the fine was levied to the uses declared in the covenant, unless, indeed, there be an intervening declaration by "other matter (than the covenant), as high or higher." Coke's report of the decision of Popham, C. J., goes on: —

"For every contract or agreement ought to be dissolved by matter of as high a nature as the first deed. *Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est.* Also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers and all others in such cases if such nude averments against matters in writing should be admitted."

It is the use of such matter, not the proving of it, that is objectionable. In like manner it is still a doctrine of the substantive law of contracts under seal that is asserted when, in conflict with some things said in this passage from Coke's Reports, we read in a late case (1879), *Canal Co. v. Ray*,³ that "Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. . . . The rule in equity is undoubted." And so in England, under the Judicature Act, a parol agreement "may be applied directly in answer to any proceeding upon the original deed brought contrary to the terms and faith of the agreement; the ancient technical rule of the common law that a contract under seal cannot be varied or discharged by a parol agreement is thus practically superseded" (Leake, Dig. Cont., 802). Whichever way the rule be, the law of evidence is untouched. The

¹ 5 Co. Rep. 25 (1604).

² 2 Salk. 677 (1696-7).

³ 101 U. S., p. 52.

change relates to the possibility of using the parol agreement, even in case it were proved; not to the proving of it, but to the use of it as a defence or a ground of action.

4. And so in modern times when a like doctrine came to be applied as among "parol" contracts, by applying to "parol contracts in writing" the old doctrine and the old remarks¹ about "contracts in writing" in the sense of sealed writings, — it was still a doctrine of the law of contract. In *Meres et al. v. Ansell et al.*,² the court, without citing any authority, deals with a parol contract in writing as if it were protected by the rules applicable to a sealed contract. The defendants had contracted in writing for an exchange of certain property of theirs for the grass from Boreham Meadow, in the plaintiff's occupation. The agreement said nothing of a close called Millcroft, which was also in the plaintiff's possession. The defendants, claiming under the agreement the grass in Millcroft also, were sued in trespass for acts done there; and upon pleading not guilty and a license, were allowed by Lord Mansfield to prove that at the time of making the writing it was agreed orally that the defendants should have, not only "the hay from off Boreham Meadow, but also the whole possession of the soil and produce both of Boreham Meadow and Millcroft." On a motion for a new trial, on the ground of admitting this "parol evidence," the full bench of the Common Pleas granted a new trial, declaring "that no parol evidence is admissible to disannul and substantially to vary a written agreement; the parol evidence in the present case totally annuls and substantially alters and impugns the written agreement." Here again the trouble was with the agreement, and not the evidence; that the agreement was an oral one. Of course, if this agreement could not, even if it were proved, be used, evidence of it was inadmissible; but the inadmissibility is traceable to the substantive law, and not to the law of evidence.

In this last case the agreement seems to have been one where the fourth section of the Statute of Frauds required that either the agreement itself "or some memorandum or note thereof" should be in writing and signed by the party to be charged therewith, or some other person thereto authorized by him. The same statute, in § 17, as regards certain contracts for the sale of goods, required as one of several alternatives, not that the agreement be in writing,

¹ *E.g.*, the passage above quoted from the Countess of Rutland's Case.

² 3 Wils. 275 (1771).

but that there be "some note or memorandum in writing;" and in § 5, in the case of all devises and bequests of real estate, that they should be "in writing and signed . . . and . . . attested . . . by three or four credible witnesses." While the statute, in requiring (in § 4) that if one would bring an action he should have a writing of the sort named, and (in § 17) a writing or one of the other alternative things, doubtless has an eye to simplicity and certainty of evidence in court, it is not merely looking out for that. For it is settled that the writing must exist at the time the action is brought, and that one obtained after that time, while perfectly answering any requirement of evidence, is not sufficient.¹ The statute, therefore, as has often been pointed out, seems, as touching the parts of it now in question, to be concerned in determining certain prerequisites to the bringing of an action. When it thus makes necessary the existence of a writing, it is only putting the same thing in other words to say that nothing but a writing will answer, and that all which the statute requires must be in writing. The real character of these propositions is obscured by phrasing them in terms of evidence, by saying, you cannot "have recourse to parol proof," you cannot supplement an insufficient paper by another "by means of parol evidence, which the statute forbids."² The true proposition is one of substantive law, viz., that a party cannot ground an action upon an agreement which is in the oral form, even if it be proved or admitted, unless there be also a note in writing existing when the action is brought.

5. The old doctrine, as has been said, which declared matter "in writing," *i. e.*, under seal, to be of a higher grade than parol, is extended in modern times to all matters, in the case of contracts and solemn instruments, which are in writing in our modern sense, *i. e.*, to all matter not oral; it is not now limited to what is by law required to be in writing. This application of the doctrine rests in part upon a supposed convention of the party or parties in putting the agreement into writing.³ The doctrine is accordingly expressed in our books in a general form, thus: "Parol contem-

¹ *Tisdale v. Harris*, 20 Pick. 9, p. 14; *Bill v. Bament*, 9 M. & W. 36; *Gibson v. Holland*, L. R. 1 C. P. 1; *Lucas v. Dixon*, 22 Q. B. D. 357; *Re Hoyle*, 67 L. T. Rep. 674.

² *Curtis, J.*, in *Salmon Falls Man. Co. v. Goddard*, 14 How. 446.

³ "We are of opinion that the rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement." — *Pollock, C. B.* (for the court), in *Harris v. Rickett*, 4 H. & N. 1.

poraneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."¹ "By the rule of law, independently of the Statute of Frauds, parol evidence cannot be received to contradict a written agreement; the instrument itself must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol."² The phraseology which introduces such a rule as this among rules of evidence is accounted for by observing again that the contract itself in its written form is called "written evidence." By a mere balance of phrase, the oral agreement is called "parol evidence." But the fundamental error of supposing that therefore the rules governing the oral agreement, and determining when and how far it is valid and available, are any part of the law of evidence, is indicated when one asks himself whether the phrase "written evidence" imports that the law relating to the nature, validity, and operation of instruments in writing is any part of the law of evidence.

6. But it is in the case of wills that one may see the most conspicuous illustrations of the error in question. The leading and very valuable little treatise by Wigram, already referred to, gives currency to it. Wigram made admirable contributions to the subject, but he accepted too readily the current language of the books, and did not discriminate between the rules of the law of evidence and the rules of construction and of substantive law which his book mainly serves to illustrate. He puts it (§ 2) as the object of his book to consider "under what restrictions is the admission of extrinsic evidence in aid of the exposition of a will consistent with the provisions of a statute which makes a writing indispensable to the purpose for which the instrument was made." If the subject were wholly free from any proper relation to the law of evidence, this language would be the less misleading. But it is not. As I have said before, there is at least one rule properly belonging to the law of evidence which is included within the scope of Wigram's discussion. The rest is of a different character, and the discussion of it all from the point of view of rules for admitting or rejecting evidence has contributed liberally to keep up the existing confusion.

Let me illustrate the way in which the law of evidence has been overloaded with matter belonging to the law of wills. No modern

¹ 1 Greenl. Ev. § 275.

² Ph. & Am. Ev. 753.

case has figured more conspicuously as an illustration of the "parol evidence" rule than *Miller v. Travers*.¹ In reality, it decides no point at all in the law of evidence. A testator had devised, for the purpose of certain trusts, "all my freehold and real estates whatsoever situate in the county of Limerick and in the city of Limerick." So stood the duly executed devise. There was a mistake in it. In fact, the testator had no real estate in the county of Limerick, and only a small amount in the city of Limerick, — quite disproportioned to the nature of the charges laid by the testator upon the devised estates. He had considerable estates in the county of Clare, and it was these that he had meant to devise. A draft of the will had been submitted to the testator, and approved and returned by him, in which the devise ran, "all my freehold and real estates whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick." While this was approved by the testator, some changes were ordered in other parts of the will; and this copy, with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer. The conveyancer, in redrawing the paper, by mistake and without authority struck out the words "counties of Clare," and substituted therefor the words "county of;" and thus the devise came into its final shape. When the testator received the new draft, he did not observe this change; and, after keeping the will by him for some time, executed it in its new and final form.

The plaintiff filed a bill "for the purpose of establishing the will . . . and carrying into execution the trusts thereof." The Vice-Chancellor directed an issue on the question "whether the testator . . . did devise his estates in the county of Clare and in the county of Limerick and in the city and county of the city of Limerick, and either and which of them to the trustees mentioned in his will and their heirs." On an appeal by the heiress at law, the Lord Chancellor reversed this decree. In arriving at this result, the Lord Chancellor (Brougham) had called in Chief Justice Tindal and the Chief Baron, Lord Lyndhurst. The opinion in the case is that of the Chief Justice, speaking for himself and the Chief Baron, — the Chancellor contenting himself mainly with adopting this opinion and decreeing accordingly.

It should be observed that there was no question of construction in the case; it was expressly declared by the Lord Chancellor and

¹ 8 Bing. 244 (1832).

the Chief Justice that, as the case stood, no question was made as to "whether the whole instrument taken together, and without going out of it, was sufficient to pass the estates in Clare."

Now, it seems plain that here was an attempt to reform a will by adding to it words omitted by mistake. "It is not," said the Chief Justice, "simply removing a difficulty arising from a defective or mistaken description, it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up of a blank which the testator might have left in his will. It amounts, in short, . . . to the making of a new devise for the testator, which he is supposed to have omitted. . . . The effect . . . would be . . . that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed." These difficulties and objections arise in point of substantive law. They are not objections which have their root in the law of evidence or any of its rules. The point of them lies in the fact that the plaintiff is seeking to give the quality and operation of a devise to that which has not the form of a devise, or, in other words, is not and cannot be a devise. The fatal objection is not that the plaintiff's evidence is bad, but that his substantive case is bad; that he is trying *to do something* which is legally inadmissible, not that he is trying to do a permissible thing by means of evidence which is objectionable.

And yet, unhappily for the effect of this case upon the law, it has in it a suggestion of this last difficulty also: evidence inadmissible under the law of evidence was offered. None the less, however, is the true proposition of the case this: Whether the plaintiff's evidence be good or bad is immaterial; he cannot have an issue, because, however admissible it may be, and however full, it can do him no good. He is seeking to do a thing forbidden by law,—to give the effect of a devise to that which has not the required form of a devise.

Observe, now, how the case was handled. It was treated as turning entirely on a question in the law of evidence. It is best, said the Chief Justice, to settle the whole question now rather than to send the case to trial; "for if the evidence and the only evidence which can possibly be brought forward by the plaintiff . . . is of such a nature . . . as to be inadmissible at the trial," it is best to determine the matter now, "rather than that the very same question should be decided upon the very same principles of evidence by the judge at Nisi Prius after an expense and delay [etc., etc.].

The main question between the parties, and which has proved the principal subject of argument before us, is this, Whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will. . . . The great contention . . . is upon the question proposed above as to the admissibility of parol evidence with respect to the estates in Clare. This question arises upon facts either admitted or proved in the case which are few and simple. . . . The plaintiff contends that he is at liberty to show by parol evidence that the testator intended his estates in Clare also to pass under the same devise. The general character of the parol evidence which the plaintiff contends he is at liberty to produce in order to establish such intention in the devisor is this [reciting what is substantially given above]. It may be taken for the purpose of the argument that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the devisor to have been to include his estates in Clare in the devise. . . . Upon the fullest consideration, however, . . . admitting it may be shown from the description of the property in the city of Limerick that some mistake may have arisen, yet still, as the devise . . . has a certain operation and effect, . . . and as the intention . . . to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words in the will, such intention cannot be supplied by the evidence proposed to be given."

The reasons for this conclusion are given thus: —

- (a) It is true that where there is difficulty in applying the words of the will to the thing or person in the devise, you may remove "the difficulty or ambiguity which is introduced by the admission of extrinsic evidence" by producing further evidence "calculated to explain what was the estate, . . . or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, *Ambiguitas verborum latens verificatione suppletur*." But this is limited to two classes of cases, neither of which include the present: (a) the case of a clearly expressed description. Where, however, it turns out that there are more than one estate or person "whose description follows out and fills the words used in the will," as the case of a devise to his son John, and he had two sons of that name, in such a case "parol evidence is admissible to show . . . which son was intended to take."
- (b) The other case is that in which the description of the person

or thing is "true in part, but not true in every particular," as where the estate is devised as estate A in the occupation of B, and it happens that the estate A is not wholly in B's occupation, or where the name is mistaken or the description imperfect. In this second class of cases "parol evidence is admissible to show what estate was intended to pass, or who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."¹ In the present case (the Chief Justice continued) neither of these things is true. This is not applying the words of the will to the estates in Clare, it is introducing new words and a new description into the body of the will itself. There is no ambiguity on the face of the will, and this extrinsic evidence produces none.

(b) The plaintiff, however, contends that he may prove the intention, "and that the will is to be read and construed as if the word Clare stood in the place of, or in addition to, that of Limerick." But this, it is manifest, is not using extrinsic evidence to apply an intention collected from the will to the property, it is using it to introduce into the will an intention not apparent upon the face of the will. But the rule for the construction of wills is clear,—that the intention must be collected from the words used in the will, and other words cannot be added. It is also setting up the unexecuted draft of a will against the duly executed will itself. If you can thus introduce new estates, why not new devisees? The cases support this view. The present case is substantially the same as if it were proposed to fill a blank where the thing or the name had been omitted. Especially is the case of *Newburgh v. Newburgh* an authority for the present decision, — where, upon the question "whether parol evidence was admissible to prove such mistake [an accidental omission of the word "Gloucester"], for the purpose of correcting the will and entitling the appellant to the Gloucester estates as if the word 'Gloucester' had been inserted in the will," the judges unanimously held that it was not.

Upon this line of reasoning the conclusion arrived at is again stated, that "the evidence offered by the plaintiff would be inadmissible upon the trial of the issue," and therefore that an issue would be useless.²

¹ In these remarks there is a failure to note the radical difference between these two classes of cases, clearly pointed out by Wigram in his little book, published only the year before. The "advertisement" (preface) is dated Jan. 1, 1831.

² Compare *Lawrence v. Dodwell*, 1 Lutw. 734 (1698), where, in an action of dower, there was a demurrer to the plea that a devise of land to the widow was made in lieu

The nature of the discussion in the case of *Miller v. Travers* may be indicated in a word by saying that it proceeds as if there had been a common law demurrer upon the evidence. Such demurrers came into existence before there was any law of evidence; they raised no question of evidence, but only a question of substantive law or of legal reasoning.¹ The question here was whether, upon the facts proposed, assuming them to be proved, it could be held that there had been a devise of the estates in Clare; and the answer was that it could not.²

6. This same confusion of a question as to what case a man has in point of substantive law, with the other question as to how he may proceed in proving the case, if he has one, appears in a great variety of other instances. It is easy enough to see, in cases not involving writings, that the long, gradual amelioration of law and legal procedure, allowing new grounds of action and defence, enlarging the scope of existing actions, and avoiding circuitry, while it means admitting evidence which could not be given before, yet may involve no change in the law of evidence. New things may be done, and therefore new things may be proved; and if new things may be proved, other new things may be proved by way of meeting them. This was the whole significance of relief in equity, — what could not be done at law might be done there; and if so, then, of course, pleading and proof must correspond. Yet all this involved no change in the principles of evidence. This, again, is the import of the extension of equitable defences by statute and at the common law, and even of the whole introduction of new forms of action; namely, that things could now be done — *e.g.*, by set-off and counterclaim — which could not be done before; done in one way which could not be done in another. Whenever they can be done, of course they can be alleged and proved. In such cases, although the new state of things is often indicated by saying that

of dower. The will did not say so. Treby, C. J.: "This averment is outside the will. If it had been said that the devise . . . was for her jointure, it would have been well. . . . No evidence outside the will can be admitted; for then one part of the will shall be in writing, and the other not. . . . It must be entirely in writing."

¹ 4 Harvard Law Review, 162.

² The true demurrer upon evidence, which assumed that all the evidence was admissible, affords 'an excellent working test to determine whether, in any given case, there be a question in the law of evidence or not. The modern substitute for the old demurrer (sometimes called by the same name), such as the motion for a nonsuit, may well enough leave open a question of evidence; namely, whether, upon the *admissible* evidence, there be any case. Not so in the older practice.

evidence of the new thing is admissible, yet it is plain that the real character of the change is not truly indicated thus. A change has taken place in substantive law or procedure; none in the law of evidence.

No less is this true as regards the same secular amelioration in law and legal procedure in its relation to writings. In *Collins v. Blanter*¹ it seems to have been first distinctly held that illegality of consideration not appearing upon the face of a bond, was a good defence. Such a bond, it was laid down by the court (Wilmot, C.J.), apparently upon a demurrer to the plea, is void by the common law. "The law will legitimate the showing it void *ab initio*, and this can only be done by pleading; . . . what strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say you shall not be permitted to plead the facts which clearly show it to be wicked and void." And so, fifteen years later, in *Pole v. Harborn*,² on a demurrer to a like plea, Lord Mansfield said: "There cannot exist such an absurdity as that a man shall not have a good defence to an action, and not be able to show or take advantage of it either by pleading or in evidence. . . . The foundation is that you shall not by parol impeach a written agreement, and say that the agreement was different; but, the agreement, being admitted, the party may come and show circumstances to vitiate the whole proceeding."³

¹ 2 Wils. 347 (1767).

² 9 East, 415, n.

³ Six centuries ago the Statute of Fines, 1 Stat. Realm, 128 (1299), after reciting that parties have lately been allowed to set up certain defences to fines, enacts that hereafter no such exceptions or answers, or submitting them to juries, shall be allowed. During the period of the Year Books there was great rigor. "If a man," said Newton, C. J., in 1440 (Y. B. 19 H. VI., 44, 93), "levy a fine of my lands by my name, I shall have no other remedy than a writ of deceit, by which I shall recover damages according to my loss." To be sure, said Robert Danby, J., in 1455 (Y. B. 34 H. VI., 14, 36), "if there be two Robert Danbys, and one of them make conusance of a matter whereby I am damaged, I can show that I am not the person, but that there is another Robert." (Compare Cary, ed. 1650, 22, in 1602.) And in 1596, about the time that Bacon wrote his famous and much-misunderstood maxim about ambiguities, the new Lord Keeper, Egerton (Hubert's Case, Cro. Eliz. 531; s. c. 12 Co. 123), "said that he had always noted this difference: If one of my name levies a fine of my land, I may well confess and avoid this fine by showing the special matter, for that stands well with the fine; but if a stranger who is not of my name levies a fine of my land in my name, I shall not be received to aver that I did not levy the fine, but another in my name, for that is merely contrary to the record; and so it is of all reconusances and other matters of record."

But in 1596, in the case last named, the Star Chamber, "there being then in court the Lord Keeper [Egerton], Popham, Chief Justice, Gawdy, one of the justices of the Queen's Bench, and Walmsley, one of the justices of the Common Pleas, and

In like manner, when it is a question whether a writing complete in point of form was delivered, or ever took effect as a contract, deed or will;¹ whether, if it did, it is voidable for fraud,² or amendable for mistake;³ whether, under a written contract, you can set up a substituted time of performance;⁴ whether in case of a deed or written transfer, absolute in form, you can show that it was given as a security merely;⁵ whether, under any circumstances, an indorser of negotiable paper in blank may set up an oral agreement that he was not to be under the usual obligations of such an indorser;⁶ whether a principal not named is bound by an agreement in writing made by his agent, orally authorized, or can

divers lords," punished one found guilty of procuring the personation of Alexander Gellibrand in a fine of his lands, and ordered that "the fine levied unto him should be void, if it could be so done, by entering a *vacat* upon the roll, or otherwise as the justices of the Common Pleas should best approve; and if it cannot be so made void, that then Hubert, by fine or otherwise, as Alexander Gellibrand should devise, should reconvey the land to him and his heirs in the same manner as it was before, or at the time levied." Popham, C. J., thought a *vacat* might be entered, avoiding the fine, and cited "the case of one Holcomb" where it had been done. The date of this last case was not given. "To warrant this, another precedent was shown, *tempore* Hen. 6." The Lord Keeper, after making the remarks quoted above, added: "But I conceive when the fraud appears to the court, as here, they may well enter a *vacat* upon the roll, and so make it no fine, although the party cannot avoid it by averment during the time that it remains as a record."

The direct defence or "averment" of fraud was distinctly upheld in 1601-1602, in Fermor's Case, in Chancery (3 Co. 77; s. c. 2 And. 176, Jenk. 253), where a lessee for years had levied a fine of the lessor's land. The Lord Keeper called for the opinion of the two chief justices; and after conference between them, "they thought it necessary that all the justices of England and barons of the Exchequer should be assembled for the resolution of this great case." The question, as Anderson's report tells us, was whether the plaintiff was barred by the fine, and if so, whether he could have relief in Chancery. The chief justices and all the others agreed that the fine did not bar the plaintiff. "And as to that which was objected, that it would be mischievous to avoid fines on such bare averments, it was answered that it would be a greater mischief . . . if fines levied by such covin and practice should bind."

Such a determination may well have been helped by the practice in Chancery of relieving against fraud in such cases by ordering a reconveyance. A case of that sort is reported as of May, 1595 (Welby v. Welby, Tothill, 99; 1 Cruise, Fines, 3d ed., 349).

Of course, in allowing new defences at law as against these solemn and sacred assurances, or new relief in equity, the substantive law of fines was changed; and it followed, as a mere matter of course, that the new matter could be pleaded and proved.

¹ Pym v. Campbell, 6 E. & B. 370.

² State v. Cass, 52 N. J. Law, 77.

³ Goode v. Riley, 153 Mass. 585.

⁴ Cummings v. Arnold, 3 Metcalf, 486.

⁵ Brick v. Brick, 98 U. S. 514; Campbell v. Dearborn, 109 Mass. 130.

⁶ Martin v. Cole, 104 U. S. 30.

recover on it, when under seal or when not under seal;¹ whether and how far you can "annex incidents" orally to a contract in writing;² and whether and how far, after an agreement in writing, you can use a contemporaneous, oral, "collateral" contract, as it is called,³ — all these questions, and many more of the same sort, although persistently thrown into the form of whether parol evidence be admissible for such purposes, really present no point in the law of evidence. The true inquiry is whether certain claims or defences be allowable. If relief can be had in such cases, the law of evidence has nothing to say as to any kind of evidence, good under its general rules, which may be offered to prove these things. In so far as extrinsic facts are legally operative or available, extrinsic evidence is admissible to prove them.

7. It will perhaps help to place the class of questions now under discussion in their right point of view if it be observed that the older law and the older decisions relating to them were often mainly concerned in keeping matters out of the hands of juries. This motive appears in the language of the Statute of Fines (*ante*, p. 345 *u.*), and in that of the Lord Keeper (*ante*, p. 346 *u.*). Indeed, there is reason to conjecture that such a motive had its place in bringing into existence the English Statute of Frauds.⁴ The notion, for instance, that absolutely and under all circumstances a fine or any other matter of record was beyond attack, belongs to a ruder period of jurisprudence than any known to our records. Always there was power in the Crown or "the king in parliament," or a regular power in the judges, to vacate and annul such matters.⁵ Wherever and before whatsoever tribunal these things could be done, there the evidence was receivable which was necessary

¹ *Briggs v. Partridge*, 64 N. Y. 357. "It is . . . difficult," says the court, "to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract." This form of expression disguises the true difficulty, that of allowing a recovery or a liability upon facts which only appear extrinsically, — a difficulty in point of substantive law. Once get over that, and the law of evidence interposes no obstacle.

² *Brown v. Byrne*, 3 El. & Bl. 703. Compare a discussion as to this sort of thing, where the contract was oral, in *Gilbert v. McGinnis*, 114 Ill. 28.

³ *Chapin v. Dobson*, 78 N. Y. 74; *Naumberg v. Young*, 44 N. J. Law, 331. The last case puts forward a doctrine which appears to me an extreme and impracticable one; and so *Browne on Parol Evidence*, c. xii. This useful practical treatise has appeared since the present article was in type.

⁴ 4 *Harvard Law Review*, 91.

⁵ See a case in 1220 (2 *Bract. Note Book*, case 107), long before the Statute of Fines, where a collusive fine was quashed. See also 1 *ib.*, Index, *sub voc.* Deceit.

to establish the basis of fact upon which the court was to act. But a jury in the days when they went on their own knowledge and were not regularly aided by testimony, when the doctrine of new trials had not developed, and the main hold upon the jury was through the attain, was quite too rude a tribunal to deal with this sacred thing in the law; it would have been preposterous indeed to let in such a body to revise the action of the judges in making record of what was done and established before them. This seemed less intolerable as time went on and jury trial developed; and, accordingly, modifications of the rule came in.

Some questions connected with the subject of the interpretation of writings, and with a rule of the law of evidence as to using extrinsic expressions of the writer's intention in aid of interpretation, must be reserved for another article.

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A DISCHARGE IN INSOLVENCY, AND ITS EFFECT ON NON-RESIDENTS.

NO question of private international law has given more trouble to the courts of the different States and of the United States during the present century than the question what effect a discharge in insolvency should have upon non-residents. Dissenting opinions have been frequent, and numerous cases have been overruled. Statutes have been declared constitutional, and then have been held to be unconstitutional, or have been disregarded as of no effect. Well-established principles have been repudiated, or else lost sight of; questions of international law have been confused with questions of constitutional law; and if at last we have reached a certain uniformity of decision, it has been by a process so unsatisfactory that the questions involved can hardly be said to have received a final answer.

On the theory that nothing can be considered as settled until it is settled rightly, it is my purpose in this article to consider the soundness of the doctrines now accepted, and to call attention to some of the decisions, and especially to the following recent cases: Pullen *v.* Hillman, 84 Me. 129 (1891); Phenix National Bank *v.* Batcheller, 151 Mass. 589 (1890); Lowenberg *v.* Levine, 93 Cal. 216 (1892).

In these three cases it is to be noticed at the outset that the question was not what the State courts of Maine, Massachusetts, and California should do as a matter of comity, but what effect they should give to express legislative enactments of the States under whose power the courts were acting.

There is a very wide difference between cases where the discharge pleaded was obtained in a foreign country, or in another State, or under another sovereignty, and those cases where the discharge pleaded was obtained under the laws of the State from which the court derives its power. In the case of a foreign discharge the court may on various grounds refuse to give effect to the foreign law and to the discharge obtained under it, since the laws of a State or country have *ex proprio vigore* no extra-territorial force. In this, as in all questions of foreign law, the question is one of comity.

But when a court is called upon to deal with the effect of the legislation of its own State, it must either obey it or else declare it to be unconstitutional. The fact that the courts of other States or sovereignties have declared the legislation in their opinion to be unwise, and have refused to give it effect, affords no ground for the domestic tribunal to follow their example. The latter may point out the foolishness of existing statutes, and may call attention to the fact that the courts of other sovereignties have refused to give them any effect. When the domestic court has done this, and has urged a repeal of the objectionable statute, it has, as it would seem, exhausted its power and performed its whole duty. The courts of a State are bound to obey the command of its Legislature, whether it agrees with international law or not, unless (in the United States) the Legislature has exceeded its constitutional powers.¹

The general principles of international law which were supposed to determine the effect upon non-residents of a discharge in insolvency were well stated some fifty years ago by Judge Story in his treatise on the Conflict of Laws, secs. 242, 280, 331, 340. He states the rules as follows:—

“The general rule is that a defence or discharge good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated.

“The general form in which the doctrine is expressed, that a discharge of a contract by the law of the place where it is made is a discharge everywhere, seems to preclude any consideration of the question between what parties it is made, whether between citizens, or between a citizen and a foreigner, or between foreigners.”

The foregoing principles were drawn by Judge Story chiefly from the Roman law, the Continental jurists, and the English decisions, from which latter he cites the opinion of Lord Mansfield in *Ballantine v. Golding*, reported in *Cooper's Bank. Laws*, 5th ed., p. 347, and the opinion of Lord Ellenborough in *Potter v. Brown*, 5 East, 124, decided in 1804. The Courts in England have followed the above principles consistently up to the present time.²

¹ Story, *Conflict of Laws*, sec. 348; *Ellis v. McHenry*, L. R. 6 C. P. 228; *McCann v. Randall*, 147 Mass. 92, 93; *Penniman v. Meigs*, 9 Johns. 325; *Murray v. DeRottenham*, 6 Johns. Ch. 52.

² *Phillimore's International Law*, 3d ed., vol. 4, p. 632; *Ellis v. McHenry*, L. R. 6 C. P. 234 (1871); *Leake's Law of Contracts*, 3d ed. (1892), p. 895.

In the United States the courts almost at the outset fell into difficulty over the point suggested by Judge Story in sec. 340 above cited; namely, the effect of a diversity of citizenship among the contracting parties. The question has been further complicated by certain provisions of the Constitution of the United States. The result is, that the principles above enumerated have been widely departed from.

Previous to the adoption of the United States Constitution in 1789, several of the States had had, at different times, insolvent laws with varying provisions, some providing for the discharge of unfortunate debtors, and others exempting them from arrest. It was also beginning to be a matter of rather frequent occurrence for debtors in failing circumstances to apply to the Legislatures of their respective States for special Acts granting them relief from their existing debts. The power of the several Colonies to enact such laws apparently never was questioned.

With the Union of the States, however, there came a number of restrictions upon this exercise of sovereign power. The United States Constitution contained, first, a provision giving the Congress of the United States authority to establish uniform laws on the subject of bankruptcies throughout the United States, and second, a clause forbidding the several States to pass any laws impairing the obligation of contracts.

Among the States which earliest enacted insolvent or bankrupt laws after the Union in 1789 were New York, Pennsylvania, Maryland, and Louisiana; and the first reported decisions are as to the effect of discharges granted under the statutes of these States. It was early settled that the provisions of the United States Constitution giving Congress power to pass a bankrupt law did not in the absence of any action on the part of Congress take away the power of the States to pass State bankrupt or insolvent laws.¹ This question was afterwards argued by Daniel Webster in *Ogden v. Saunders*² as being still open, but was considered by the court to have been settled by their decision in *Sturges v. Crowninshield*.

The effect of the clause in the United States Constitution forbidding the States to pass any laws impairing the obligation of contracts also came up for consideration at an early day, and has been coming up ever since; and it is only of late that it can be said to have received a final answer.

¹ *Sturges v. Crowninshield*, 4 Wheaton, 122 (1819).

² 12 Wheaton, 249 (1827).

The first important case upon the subject was that of *Sturges v. Crowninshield*.¹ In this case it was held that the States may pass insolvent laws, provided there is no United States bankrupt law in force; but such State insolvent laws are unconstitutional in so far as they undertake to discharge or impair existing contracts. The language of the court was broad enough to make all State insolvent laws, whether prospective or retrospective, unconstitutional, and the language of the court in *M'Millan v. M'Neill*,² was such as to induce a belief that the court meant to declare all State insolvent laws unconstitutional, as impairing the obligation of contracts.

But in *Ogden v. Saunders*,³ four of the judges, being a majority of the court, declared that so far as future contracts were concerned, a State law was constitutional. The chief grounds for so declaring were that the language used in the Constitution was not entirely clear, and it was not to be supposed that the States intended to part with their power to regulate and discharge future contracts, and that it would be too much of a curtailment of the powers of the States to hold that the regulation and discharge of future contracts were taken away. Judge Johnson was one of the four judges so holding. But on the question of the extra-territorial effect of a discharge in insolvency, he was ready to hold that its effect must be confined to the State courts of the State where the discharge was granted, and that non-residents could go into the United States courts or into the courts of other States, and there be free from the effect of the discharge. A majority of the court concurred with him in this view. In *Baldwin v. Hale*⁴ this view was approved and followed; and again in *Denny v. Bennett*⁵ it is said, "The proposition lying at the foundation of all these decisions is that a statute of a State, being without force in any other State, cannot discharge a debtor from a debt held by a citizen of such other State." See also language of the court in *Cole v. Cunningham*,⁶ to the same effect.

The language used in these cases has been supposed to extend even to the case of a non-resident creditor who sues the debtor in the State courts of the State granting the discharge, and several cases have been decided in the State courts in accordance with this supposed doctrine, among them the three cited at the beginning of this article.

¹ 4 Wheaton, 187 (1819).

² 4 Wheaton, 209.

³ 12 Wheaton, 213 (1827).

⁴ 1 Wall. 223 (1863).

⁵ 128 U. S. 497 (1888).

⁶ 133 U. S. 114, 115 (1800).

It is the soundness of this doctrine and the correctness of the cases decided under it that I desire especially to consider. The doctrine in question was briefly stated by the Hon. I. F. Redfield in a note to *Baldwin v. Hale*, published in 1863, in 12 Am. Law Reg. 469. He says, in substance, that the validity of the discharge must depend upon the extent of the jurisdiction of the tribunal which renders the judgment or decree granting it; the court must have jurisdiction over both the debtor *and the creditor*. It can have no jurisdiction over the contract which attends the person of the creditor, unless the creditor submits it to the court and claims a dividend. Otherwise the case is the same as a personal action where the defendant is not within the jurisdiction and does not appear in the suit.

The doctrine was again stated by Guy C. H. Corliss, Esq., of St. Paul, Minn., in an article published in 1884 in the Albany Law Journal, vol. 29, page 186. He uses the following language: "The question is one of jurisdiction, and is to be settled by the residence of the creditor at the time of the institution of the insolvency proceedings. . . . Whether at the time of the execution of the contract he was a citizen of the State in which the discharge was granted is therefore immaterial to the inquiry. . . . The proceedings do not bind citizens of another State who have not voluntarily appeared and waived their rights. . . . They do not bind him even when he seeks to enforce his claim in the very court which granted the discharge. . . . Nor even though the contract was governed by the laws of that State."

We may safely say, I think, that there is no longer any ground for holding that a discharge in insolvency is void against a non-resident because of any constitutional objection arising under the clause forbidding a State to pass laws impairing the obligation of contracts. It seems now to be settled that the inhibition of the Constitution applies only to legislation having a retrospective effect. If an insolvency law precedes the contract, it does not, within the meaning of the Constitution, impair its obligation.¹

No other clause of the United States Constitution has been pointed out as yet which limits the power of the States in regard to insolvency matters, and it is fair to assume that there is none.

¹ *Edwards v. Kearzey*, 96 U. S. 601 (1877); *Denny v. Bennett*, 128 U. S. 495 (1888); *Butler v. Goreley*, 146 U. S. 303 (1892); *People's Sav. Bank v. Tripp*, 13 R. I. 621; *Miller on the Constitution of the U. S.* 531. See, however, *Black on Constitutional Prohibitions*, secs. 116-124 (1887), for some views to the contrary.

The Fourteenth Amendment, to be sure, furnishes a limitation as to the jurisdiction of State courts in personal actions, but, as I shall point out later, does not undertake to limit the power of the States in proceedings *in rem*.

Before proceeding to any analysis of the principles which enter into the question of the power of a State court to grant a discharge, I invite attention to a brief review of some of the cases in a few of the different State courts, for the purpose of showing, first that the courts in nearly every State were, at the outset, disposed to give full effect to the doctrine that a discharge granted at the place, *i. e.*, in the State or country, where the contract was made, should be given effect everywhere, as well against creditors who were non-residents as against those who were residents of the State granting the discharge; and second, that this disposition of the State courts was changed after the case of *Ogden v. Saunders*, because it was supposed by many of the judges that the United States Supreme Court had decided on some constitutional ground that a discharge in insolvency could have no extra-territorial effect.

I take the States in geographical order.

Maine.—The question in every case except the two latest ones was a purely international one: namely, what effect the court in Maine should give by way of comity to discharges obtained in other States or countries.

Among the early cases we find that of *Very v. McHenry*.¹ In this case a discharge obtained in New Brunswick was held good in Maine against a citizen of Maine, the contract sued on having been made in New Brunswick. The decision is based on the English doctrine that the *lex loci contractus* as a matter of comity should be allowed to govern.

Three years later, in *Palmer v. Goodwin*,² and *Bancher v. Fisk*,³ the same court held discharges obtained in Massachusetts of no effect in Maine against non-residents. In the last of these cases, it is stated that the United States Supreme Court in *Ogden v. Saunders* decided as a matter of constitutional law that a discharge has no effect on a contract made with a citizen of another State.

Four years later, in *Long v. Hammond*,⁴ and *Mansfield v. Andrews*,⁵ discharges in New Brunswick were again held good in Maine. In *Felch v. Bugbee*,⁶ and *Chase v. Flagg*,⁷ the court again

¹ 29 Me. 206 (1848).

⁴ 40 Me. 204 (1855).

⁶ 48 Me. 9 (1859).

² 32 Me. 525 (1851).

⁵ 41 Me. 591 (1856).

⁷ 48 Me. 182 (1859).

³ 33 Me. 316 (1851).

refused to give effect to discharges obtained in Massachusetts as against non-resident creditors, though the note sued on was in one instance made in Massachusetts, and by its terms was payable there.

In *Hills v. Carlton*,¹ we have a case of the kind above referred to: namely, of a discharge obtained in Maine, and pleaded in a Maine Court against a non-resident creditor. The court, on the doctrine of a want of jurisdiction as laid down in *Baldwin v. Hale*, held the discharge no bar. Nothing is said about the Maine statute being unconstitutional, and no notice is taken of the fact that the court is disregarding an express statutory enactment of its own State.

In the case of *Pullen v. Hillman*,² we have one of the latest decisions on the subject under consideration. The suit was a note made in Maine and expressly payable in Maine, the maker and payee at the time the note was given being both citizens of Maine. After the note was given, the payee moved to New York, and the maker, becoming insolvent, obtained a discharge in Maine. It was held that according to the doctrine of *Baldwin v. Hale*³ and *Pennoyer v. Neff*,⁴ the court granting the discharge had no jurisdiction over the creditor, and that hence the discharge was no bar. The case of *Stoddard v. Harrington*,⁵ where the same question was decided in the opposite way, is noticed and disapproved. No notice is taken of the fact that the court is nullifying a statute of Maine without declaring it unconstitutional, and no attention is given to the language of the United States Supreme Court in *Cole v. Cunningham*,⁶ according to which the citizenship of the debtor and creditor at the time the debt was contracted is what will govern.

It is interesting to compare this case with *Lowenberg v. Levine*,⁷ where the court held that even though the creditor was a resident of the State during the insolvency proceedings, the discharge was no bar, since he was a non-resident when the contract was made.

New Hampshire.—None of the cases in New Hampshire, save the two latest, have involved anything more than an international question. In all the earlier cases the discharges under consideration had been obtained in some other State or country. In *Stevens v. Norris*,⁸ which was the case of a discharge obtained in Massachusetts, the court, after a careful consideration, fully adopted and approved the doctrine that the *lex loci contractus* ought to

¹ 74 Me. 156 (1882).

² 84 Me. 129 (Dec., 1891).

³ 1 Wall. 223.

⁴ 95 U. S. 714.

⁵ 100 Mass. 87

⁶ 133 U. S. 115.

⁷ 93 Cal. 216 (1892).

⁸ 30 N. H. 466 (1855).

government, without reference to the residence or citizenship of the parties.

Two years later, in *Whitney v. Whiting*,¹ the court felt constrained by *Ogden v. Saunders* to hold a discharge no bar, it being supposed that the United States Supreme Court had decided that where the contract was made with a non-resident, a State insolvent law granting a discharge was unconstitutional, as impairing the obligation of the contract.

Three years later, in *Brown v. Collins*,² the court held that where a note was made in Massachusetts, and by its terms was expressly made payable there, a discharge in Massachusetts could and should be held good in New Hampshire.

Four years later, *Brown v. Collins* was overruled by *New Market Bank v. Butler*,³ where on the same state of facts it was held that a discharge in Massachusetts was no bar in New Hampshire. The decision is based on *Baldwin v. Hale*, which the court supposed to be decided on constitutional grounds under the section of the United States Constitution forbidding States to pass laws impairing the obligation of contracts. In *Stirn v. McQuade*,⁴ the court again nullified a New Hampshire statute, and held a discharge granted in New Hampshire no bar as against a non-resident, the reason for the decision being a supposed want of jurisdiction.

Vermont. — In *Herring v. Selden*,⁵ the court held that under *Sturges v. Crowninshield* it must be held that all State insolvent laws are unconstitutional. In *Peck v. Hibbard*,⁶ the court held a discharge in Canada good in Vermont, and fully approved the doctrine that the *lex loci contractus* ought to govern.

In *Bedell et al. v. Scruton*,⁷ a discharge in Vermont was held no bar as against a non-resident. The Vermont insolvent law was not expressly declared unconstitutional, but it was held to be inoperative.

In *McDougall v. Page*,⁸ the case was twice argued, and the court was divided; but it was decided that a discharge under the United States bankrupt law was no bar against an alien non-resident where the contract was made and was to be performed in Canada. The language of the United States Bankrupt Act was held to be so far uncertain as to allow the court to construe it not to apply to non-resident aliens, the contract being a foreign one. The court, as

¹ 35 N. H. 457 (1857).

² 41 N. H. 405 (1860).

³ 45 N. H. 236 (1864).

⁴ 22 Atl. Rep. 451 (1890).

⁵ 2 Aiken, 12 (1826).

⁶ 26 Vt. 698 (1854).

⁷ 54 Vt. 493 (1882).

⁸ 55 Vt. 187 (1882).

it would seem, admitted that if the language of the United States Bankrupt Act had been peremptory, it would have been binding upon the court.

In the latest case in Vermont, *Roberts v. Atherton*,¹ a discharge in Vermont was held void as against a non-resident, because the creditor was outside the jurisdiction of the court at the time the petition in insolvency was filed. The case is decided on jurisdictional, and not on constitutional, grounds.

Massachusetts. — The following are the leading cases: *Blanchard v. Russell*,² in which the doctrine that the *lex loci contractus* ought to govern was fully indorsed; *May v. Breed*,³ in which a discharge in England of a contract made there was held good in Massachusetts; *Scribner v. Fisher*,⁴ in which it was held that a discharge in Massachusetts of a contract made and by its terms to be performed there should be held good in Massachusetts, even against a non-resident creditor; *Kelley v. Drury*,⁵ in which, on account of *Baldwin v. Hale*, *Scribner v. Fisher* was overruled; *Stoddard v. Harrington*,⁶ in which it was held that if the debtor and creditor were both residents of Massachusetts when the contract was made, a discharge in Massachusetts would be a bar even if the creditor moved out of the State before the insolvency proceedings were instituted; *Phenix Bank v. Batcheller*,⁷ in which *Kelley v. Drury* was followed, if not approved.

Rhode Island. — In *Pattison v. Wilbur*,⁸ a discharge under the United States bankrupt law was held good against an alien non-resident, the contract having been made in the United States, and the creditor having moved to Scotland before the bankruptcy.

New York. — It was early held that if according to the provisions of a New York insolvent law or the United States bankrupt law a discharge was expressly declared to be a bar, the courts of New York must give it that effect.⁹

In *Mather v. Bush*,¹⁰ the doctrine that the *lex loci contractus* ought to govern was fully approved; but later, in *Donnelly v. Corbett*,¹¹ and *Soule v. Chase*,¹² the court, on supposed constitutional grounds, followed the United States cases, and held a discharge ob-

¹ 60 Vt. 563 (1888).

⁴ 2 Gray, 43 (1854).

⁷ 151 Mass. 589 (1890).

² 13 Mass. 1 (1816).

⁵ 9 Allen, 27 (1864).

⁸ 10 R. I. 448 (173.)

³ 7 Cush. 15 (1851).

⁶ 100 Mass. 87 (1868).

⁹ *Penniman v. Meigs*, 9 Johns. 325 (1812); *Murray v. DeRottenham*, 6 Johns. Ch. 52 (1822).

¹⁰ 16 Johns. 233 (1812).

¹¹ 7 N. Y. 500 (1852).

¹² 39 N. Y. 342 (1868).

tained under a State insolvent law to be no bar against a non-resident, even in the State where the discharge was granted. In *Pratt v. Chase*¹ the same result was reached, but more was said about want of jurisdiction than about unconstitutionality. In *Phelps v. Borland*,² a discharge in England of a contract made there was held no bar in New York against a citizen of New York.

Maryland. — There is one point which is peculiar to Maryland. It was early held, in the case of *Larrabee v. Talbott*,³ that inasmuch as it must be held under the United States cases that all State insolvent laws are unconstitutional as against non-residents, it must also be held that a non-resident creditor can come into the State courts of Maryland and take from the assignee in insolvency any assets in his hands. This apparently continued to be the law in Maryland down to 1884, when, in the case of *Pinckney v. Lanahan*,⁴ the court held, on the strength of *Crapo v. Kelly*,⁵ that the statutory title of the assignee was good within the State, even as against non-resident creditors.

The necessary limits of this article prevent anything more than a cursory reference to a few of the cases in some of the States. For the convenience of those desiring to make a study of the subject, a list of cases, which is believed to be quite complete, is given in a note printed at the end of this article.

SUMMARY. — The foregoing examination of the cases shows that the doctrine has become very generally accepted that a discharge will be of no effect (even in the courts of the State where the discharge is granted) against a non-resident creditor, unless he becomes a party to the insolvency proceedings by voluntary appearance and participation in the same, or is made a party by a legal service of process, — by which is meant personal service, and not merely a publication of notice.

First Objection to this Doctrine. — It is to be noticed, first, that it has not usually been considered necessary, in order to give jurisdiction to a bankruptcy court, to require any service of process, so far as creditors are concerned, except a publication of notice and a sending of notice by mail to those of the creditors resident and non-resident whose address is ascertained. Under the English Bankruptcy Acts and the several United States Bankrupt Acts, and under the Massachusetts insolvent law, and I think under the

¹ 44 N. Y. 597 (1871).

² 103 N. Y. 406 (1886).

³ 5 Gill, 426 (1847).

⁴ 62 Md. 447 (1884).

⁵ 16 Wall. 610.

various State insolvent laws, this has been the only notice considered practicable or necessary.

Second Objection.—Every Bankrupt Act which contains a provision for the debtor's discharge has two chief ends to accomplish, — first, a distribution of all the existing property of the debtor; and, second, a release of the debtor from his existing obligations. The distribution of the property is not necessarily to be an equal or ratable one. Certain allowances are made to the debtor and his family. Certain claims, *e.g.*, those for taxes and wages, are given a preference, either for their full amount or for a proportionate part. The whole proceeding is an arbitrary act of the sovereign power which has for the time being control over the person and property of the debtor. The proceeding is designed, not simply to secure what seems to be an equitable division of the debtor's assets, but also is intended for the debtor's benefit, to raise him out of a hopeless condition of despondency likely to land him in the poorhouse or asylum. The insolvent law seeks to put him in the way of retrieving his shattered fortunes and of becoming a useful member of society, able to provide for his own support and that of his family, and perchance to contribute something to the support of the government under which he lives.

The public benefit which is aimed at is the justification of the government for the arbitrary exercise of its power. The proceeding is had not simply for an adjustment of the relations between the debtor and his creditors, but because the whole community in which the debtor lives and of which he forms part are interested in having him put on his feet again.

Every member of society stands in certain relations to those around him, and has certain capacities of acting towards them and with them. Of these relations and capacities some are domestic, some are civil, and some are contractual. The sum of these relations and capacities constitutes the status of the individual. The status of an individual at any particular time is to be determined by the court before which his status in any particular becomes a matter in issue. But it has generally been considered that the status which a person has at the place of his domicile, *i.e.*, where he resides, is to be especially regarded in determining his status elsewhere.

If a person comes before or is brought before a court in the place of his domicile, and the question of his status in any particular which affects the public welfare becomes a question to be de-

terminated, it has been generally considered that the proceeding so far partakes of the nature of a proceeding *in rem*, that the court, after such a publication or sending of notice as has been prescribed by the government of that country, acquires jurisdiction to determine what the status of that person is; and the decision of the court is held to be binding on all the world so far as all the world comes into that country,—or, rather, comes within the power of that government of which the court forms a part. To illustrate,—the marital relation originates in a contract entered into with more or less of ceremony and solemnity. Each of the parties to the marriage contract acquires a certain relation which forms a part of the status of each. How is the legality of this relation to be determined, or if need be, how is the relation to be terminated? Must the court have both the parties to the marriage before it, or can it, if one is before it, determine the status of that one? It would seem now to be quite well established that the court where one of the parties is domiciled may, on the application of that party, after a publication or sending of notice, acquire jurisdiction to grant a divorce even though the other party is out of the country and cannot be served with process or compelled to come before the court.¹ Other sovereign powers may not admit the validity of the decree; but in the United States other States, under the Constitution as it is now generally considered, must give it full faith and credit.

Now, what I desire to suggest is that the contractual relation in which a debtor stands towards his creditors is a part of his status; that the Legislature of the State or country in which the debtor is domiciled may, on grounds of public policy, give the courts of that State the power to terminate this relation and alter this status of the debtor and make it something different from what it was. Other sovereign powers may not recognize the change of status, but within the power of the sovereignty which has declared the debtor's status, this status must be recognized, and effect given to it. The doctrine which I have enunciated or attempted to enunciate is not without the support of recent authority.²

It would seem to be on this theory alone that a discharge in

¹ Black on Judgments, vol. 2, sec. 925.

² See Black on Judgments, vol. 2, sec. 807, and cases cited; *Pennoyer v. Neff*, 95 U. S. 714, 722, 734.

bankruptcy under the United States bankrupt law can be properly held binding within the United States on alien non-residents not served with any process.¹

According to this doctrine, a discharge of a debtor under a State insolvent law ought to determine the status of the debtor within the State granting the discharge, or at least while he is within the power of the State courts of that State; and it ought to be a good bar to any action, even by a non-resident creditor who comes into the State, and who, by going into the State courts, subjects himself to the power of the State and puts the State to expense on his behalf.

It follows also from the foregoing that the courts of the United States sitting in the State where the discharge is granted (and where in their common law proceedings they ordinarily act according to the State law) ought to recognize the status which the debtor has acquired under the laws of that State. The question is not the ordinary one of expediency or comity; it is a question of interfering between the individual citizen and the government to which he owes the most immediate allegiance. It is in effect saying to the debtor, "Your State government, to be sure, has decreed that you shall have on your native soil a certain status; but this court will not recognize this status, because there are persons in other States who did not assent to the decree, and this court considers their rights as paramount to the rights of the community in which you live.

Third Objection. — The doctrine of the non-effect of a discharge as against non-resident creditors is not in harmony with the other rules which are applied to insolvency cases. As already stated, one chief end of a State insolvent law is to make distribution of the debtor's existing assets. To accomplish this, the State authorizes an arbitrary seizure of the same, and transfers the title or right to administer to a public officer, called usually an assignee. There is the same exercise of arbitrary power in this seizure of the debtor's property that there is in the determination of the debtor's status and the giving him of a new status. If the State has power as against non-resident creditors to do the one, it would seem to follow that it has power to do the other.

That it has power to seize the property and hold or distribute it even as against non-residents is generally conceded. In Maryland

¹ See Bump on Bankruptcy, 9th ed., pp. 727, 746.

it was supposed for a long time that the State did not have this power; but now even there the power is exercised.¹

If a State in the exercise of its sovereign power may on grounds of public policy seize the existing property of a poor debtor and say what shall be done with it, why may it not also, in the exercise of the same power and for like reasons, say what shall be done with the after-acquired property of the debtor, even to the extent of freeing it from the claims of any existing creditors, resident or non-resident? Other States, to be sure, may not give such laws any extra-territorial effect; but that need not prevent the State from freeing the debtor and keeping him free while he remains upon his native soil and within the power of the State government.

The present jurisdictional doctrine as I trace it owes its origin to the language of Judge Johnson in *Ogden v. Saunders*,² where he says, in substance, that proceedings in insolvency are judicial in their nature, and that all parties whose rights are affected are entitled to a hearing. This language was repeated and enlarged in *Baldwin v. Hale*,³ and has been repeated in many cases in the State courts as decisive of the whole question.

No consideration of the accuracy of this language has been had, so far as I am aware; but it has always been accepted by the courts without question or criticism. I desire now to suggest that the language used by Judge Johnson may have been pushed farther than he intended that it should be. If the head-note in *Ogden v. Saunders* truly indicates the scope of Judge Johnson's views, he did not mean to say that a discharge granted under a State insolvent law could not be a bar against a non-resident creditor in the courts of the State granting the discharge.

I desire further to suggest that the doctrine that proceedings in insolvency are essentially the same as personal actions, so that the same service of process is required in order to give jurisdiction, is altogether erroneous.

I have already fully explained how it is that the question of a debtor's discharge is a question as to his status, the determination of which is in the nature of a proceeding *in rem*. Let us examine

¹ *Pinckney v. Lanahan*, 62 Md. 447 (1884). See *Crapo v. Kelly*, 16 Wall. 610 (1872), in which it was held by the United States Supreme Court (two judges dissenting) that a statutory assignment, under a State insolvent law, of property actually within the State was good even as against a non-resident creditor. *Geilinger v. Philippi*, 143 U. S. 246, is to the same effect.

² 12 Wheaton, p. 366.

³ 1 Wall. p. 233.

now a little further, and see if the reasons which require service of process upon a defendant in a personal action apply to the case of an insolvency proceeding having for its end the granting of a discharge to the debtor. A personal action by a creditor against his debtor has for its chief, if not for its sole, purpose the enforcement of the individual rights of that creditor against the debtor. The public have no particular interest in the controversy. The debtor is entitled to be heard before a judgment is rendered, because he may have some defence which will show that the plaintiff is not really a creditor at all. If he is not before the court and has no legal notice, the court cannot pass any just decree. But when we come to an insolvency proceeding we come to a proceeding in which a decree is to be made on grounds of public policy, to promote a public benefit. If a non-resident creditor has a particular interest which is in conflict with the public welfare, the court, acting under power from the State, may say that the private interest shall give way.

Possibly some one will object to this, and say that it will violate the rule that private property shall not be taken without compensating the owner. The answer to this is that the claim of the creditor against his debtor is not an absolute and unconditional one. It may fairly be assumed that every man, when he lends another money without security, or sells him goods on credit, and becomes his creditor, does so with more or less of apprehension that his debtor may become bankrupt and fail to pay him.

The insolvent laws, as well as all the other laws existing and in force when the contract is made, form a part of it, or at least govern it, so that if the debtor becomes insolvent and is granted a discharge, that only has happened which the parties at the outset must have contemplated as possible. Still further, there is no imperative reason, so far as the debtor's discharge is concerned, why each creditor should have notice. If all the existing property is divided without notice to a creditor, that indeed may be a hardship; but it is well settled that the court has jurisdiction to divide the property even as against non-residents. But in granting the discharge the relations between the non-resident creditors and the debtor are not brought into dispute. The non-resident creditors may be assumed to have valid claims. If they have notice and come into court, they can say no more than that they have valid claims. What they may say or may not say as to their own claims will not be of assistance

to the court in rendering its decree. The decree is to be rendered upon considerations entirely apart from the validity of these particular creditors' claims. The non-resident creditors might, to be sure, if they appeared, suggest to the court that the debtor ought not to have a discharge, because he has concealed a part of his assets or been guilty of some other fraud; but this would be a suggestion based on grounds of public policy, and the court in making its decree may rely upon the assignee and the creditors who have appeared to make this suggestion, if it ought to be made. In any aspect of the case, then, there is a wide difference between insolvency proceedings looking to a discharge, and a personal action to enforce an individual right. The one is a proceeding *in rem* or *quasi in rem*, and the other is *in personam*.

Fourth Objection. — The doctrine now accepted by the courts in very many instances works great hardship, and has the effect of entirely defeating the purpose for which the insolvent law was passed. The creditors who form a part of the community in which the debtor resides, while they are forced to accept a dividend in full satisfaction of their claims, nevertheless are deprived of the hope of any future benefit which might result from the debtor's being given a chance to start again. The debtor, instead of being able to work with some hope of success for the benefit of those around him, is put in bondage to his unfriendly non-resident creditors. He must work out his debts to them before he can begin to have any benefit from his discharge. In very many cases this means that a debtor will never have a chance of starting again, and must continue in the state of despondency from which the insolvency law intended to relieve him.

Hollis R. Bailey.

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Bonds, 15 Wall. 300 (1872); Walker v. Whitehead, 16 Wall. 314 (1872); Edwards v. Kearzey, 96 U. S. 601 (1877); Denny v. Bennett, 128 U. S. 495 (1888); Cole v. Cunningham, 133 U. S. 107 (1890); Geilinger v. Philippi, 133 U. S. 246 (1890); Brown v. Smart, 145 U. S. 454 (1892); Butler v. Goreley, 148 U. S. 303 (1892).

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REGISTRATION OF TITLE TO LAND.

I.

A RECENT article by Mr. H. W. Chaplin¹ has stated with great clearness and force the insecurity of our present method of transferring the title to land. The author, however, left to another the task of describing such a method of transfer as should be free from the defects he pointed out. The problem of a safer and more perfect system has lately been considered in several States. New York, Massachusetts, Illinois, Minnesota, Indiana, and probably other States, have appointed committees or commissions to consider the matter; and, except in New York, there seems to be a consensus of opinion that the "Torrens system" of registration of title, so called, can alone afford relief. Let me, then, briefly describe this system.

The essential feature of the Torrens system is this: that title to land passes only by the entry of the transfer upon an official register. A deed between the parties is entirely inoperative in so far as the legal title is concerned. Land, in fact, becomes as to its title entirely like stock in a corporation: it is transferable only on the official books. The owner of land shows his right, not by a deed from an individual grantor, but by a certificate of title issued to him by the official registrar of titles, in form a copy of the official entry, and in every respect like a certificate of stock. In order to transfer his title, the owner must bring or send to the registrar his certificate, which is then surrendered and cancelled; and after the proper entry on the register, a new certificate is issued to the transferee, certifying that the land now stands in his name on the register. The person in whose name the land stands on the register is the legal owner of the land; or, in less scientific, but no less accurate, language, the land always goes with the certificate.

For example, let us suppose that John Smith is the registered owner of a parcel of land, and that he wishes to convey it to Thomas Jones. He executes a deed of the land, as now, to Jones; but that does not pass title to the land. He gives Jones also his certificate of title. Jones goes with these two instruments to the

¹ Record Title to Land, 6 Harvard Law Review, 302.

registrar, surrenders the certificate, and delivers up the deed. Acting upon the authority of the deed, the registrar cancels upon the register the entry of Smith's title, enters upon another page the title of Jones, and issues a new certificate to Jones. The legal title is now in Jones. If Smith wishes to convey to Jones only part of his land, the surrender is made, the entry of title in Smith is cancelled as before, a new entry of title in Jones as to the portion conveyed is made, and a new entry is also made of title in Smith to the part unconveyed; and a certificate is issued to each, covering the land entered as his. The old certificate is thus exchanged for two certificates, which together cover the whole parcel.

If some legal estate in the land less than a fee simple is created, that fact is entered upon the official register and upon the certificate of the owner in fee, and the owner of the lesser estate also gets a certificate stating his right. A mortgage, for instance, is created by entry of the incumbrance upon the register and upon the owner's certificate, and a certificate of the mortgage is also issued to the mortgagee. An easement or a life estate is created in the same way. A mere equitable interest, however, is not so created; for the register purports to deal solely with the legal title. But one who has an equitable interest in land may prevent transfer of the legal title to a purchaser for value without notice, and in this way fully protect his right, by entering upon the register a *caveat*, or caution, setting forth briefly the nature of his claim. The legal owner may remove the *caveat* by litigating the question and obtaining a judgment in his favor, and, on the other hand, the claimant must take seasonable steps to enforce his claim. A legal lien upon land, such as an attachment, judgment lien, or mechanic's lien, is secured in the same manner; to wit, by entry upon the register of a claim, to be enforced or removed by subsequent proceedings.

The fact that the title to land is always in a registered owner makes a Statute of Limitations unnecessary; for as no party could acquire an apparent but invalid title to which after the lapse of time his right ought to be protected, the whole justification for a title by lapse of time is lacking. It is accordingly provided by the Torrens system that title by prescription shall be abolished. This at once puts an end to the acquisition of easements by prescription.

The devolution of land upon the owner's death is much sim-

plified. The certificate of title goes to a realty representative, appointed by the probate court,—usually the executor or administrator. After the estate is settled, distribution of the real estate to heirs or devisees is ordered by the court, and upon surrender of the old certificate by the realty representative, entry of title is made and new certificates are issued, according to the terms of the court's order.

Such in its general outlines is the Torrens system. There is no magic about the process by which it secures the land to the registered owner. It is not in any sense what it is sometimes called,—a system of guaranteeing titles. Neither the State nor any individual becomes a guarantor of possession to the certificate-holder; he keeps the land against all claimants because it passed to him by the entry on the register, and is therefore his land.

II.

One defect in the present record system pointed out by Mr. Chaplin is the possibility of fraud and personation; let us see how the difficulty is met under the new system. If it is proved that title has been entered in an innocent purchaser because of a forged deed and the surrender of the prior certificate, two courses are possible, and each is adopted in some jurisdictions that employ the Torrens system: the one course is to give the land to the holder of the new certificate; the other to give it back to the true owner. If the latter course is adopted, an exception is created to the general rule that the land follows the certificate; if the former, an exception is introduced to the principle of the common law that no innocent party shall lose a right because of a forgery. Injustice must, therefore, be done to one party, and this particular objection to the record system is not entirely removed; and in fact no system is conceivable in which loss by forgery and personation can be prevented. But it is possible to render fraud of this sort extremely difficult, and this is done by the Torrens system. Two important safeguards are introduced. First, the surrender of a certificate must be made; and to fulfil this requirement the forger must either get possession of the true certificate, or forge an instrument precisely like it. Second, the registered owner may, if he chooses, sign his name upon the page of the register that contains the entry of the land to him; and in that case the forgery must be so skilfully done as not to be discoverable upon comparison with the genuine signature. It is possible in such cases to com-

pensate the party who loses his land; and this is usually done. A certain small amount is paid on each transfer, which goes into a fund; and out of this fund any one who has lost his land without being chargeable with laches receives compensation.¹

Another class of difficulties referred to by Mr. Chaplin arises upon the death of an owner of land, — doubts, namely, as to the true heir, or as to the validity of a partition among heirs, and title arising upon the production of a will after the lapse of years. These difficulties are cured, in the Torrens system, by the provision for a realty representative and final distribution by order of court. The acquisition of rights by prescription, as has been said, is impossible under the Torrens system, and thus a most annoying source of defect is removed. The interpretation of the description of land in a conveyance is a matter that cannot be made certain by any method of transfer. The most that can be done is to simplify the descriptions and make them as clear as possible. This is accomplished by the provision that each entry of title shall be accompanied by a plan; and in addition to this, the fact that the entries are indexed according to the location of the land also tends to secure accuracy.

The other defects pointed out by Mr. Chaplin fall into another class. They are due to informalities in the deed, to latent incapacity to convey, like insanity, or to estoppel by deed. Such defects disappear under the Torrens system. The conveyance is not effected by the deed, or by any act of the party, but by entry on the official register; and this entry has been regularly made. The former owner has therefore lost his land; and though he has a right to demand a reconveyance from his immediate grantee, this right does not affect a purchaser for value without notice. Nor is it just that it should. The hardest case is that of a lunatic; having made a conveyance while of unsound mind, he is properly allowed a right to attack the conveyance. But an innocent holder has at least an equal right, on grounds of natural justice, to keep the land. To give the land to either party deprives the other of it; and it is quite equitable not to allow the lunatic, by whose act the difficulty arose, a right to the land, but to remit him to his action *in personam* against the party who dealt with him. In this respect the result reached under the Torrens system is the juster one.

¹ This method is now in operation in England to indemnify persons to whom certificates of stock in a corporation have been issued by the corporation upon a forged power of attorney. 54 & 55 Vict. ch. 43.

Besides the dangers of defect in the title, stated by Mr. Chaplin, there are other serious objections to the present record system. Such objections are the expense of a fresh examination of title at each transfer; the delay in effecting a transfer, made necessary by this examination; the reduction in market value of land caused by this expense and delay; and the alarming multiplication of records, caused by the necessity of keeping in active use the records of all deeds from the first settlement of the country. "No way is perceived," says the Illinois Commissioners,¹ after stating these objections, "by which the present system can be retained, and these defects removed." But the Torrens system puts an end to them all.

This is not an untried system, nor is it, as has often been said, one which can be successful only in new countries. On the contrary, it has long been in use in several of the countries of Europe. Its history is briefly stated by the Illinois Commission:²—

"This system has been in operation for over a century in Prussia, Bavaria, and other European States, notably in Hamburg, where it has been used for upwards of six hundred years. It has been in use since 1858 in South Australia,³ since 1861 in Queensland, since 1862 in Victoria and also in New South Wales, since 1863 in Tasmania, since 1870 in New Zealand and in British Columbia, since 1874 in Western Australia, since 1884 in Ontario, and since 1885 in Manitoba.

"So far as your Commissioners have been able to learn, the system has given general satisfaction to the landowners of every country where it has been tried. One country after another has adopted it, each with uniform success. Wherever it has been tried, it is in actual use to-day.

"In 1875 this system was put into operation in England; but a comparatively small part of landowners have as yet availed themselves of its benefits. The Register-General in England reports that the number of registered owners is steadily increasing, and that the manifest advantages of a registered title are gradually overcoming the deep-rooted opposition of the English landowner, to having his title a matter of public record."⁴

¹ Report of the Land Transfer Commission, p. 2.

² Report, p. 3.

³ Where it was introduced by Sir R. R. Torrens; hence the "Torrens system."

⁴ The Commissioners seem to be in error in implying that the system has been in use in Prussia for a long period. It was introduced into that kingdom in 1872, after a

It may be proper to point out, to those who fear the possible effect of such a system upon the substantive law of property, the striking similarity of the Torrens system, so far as the passing of title goes, to the system of copyhold tenure in England. Holding by copy of court-roll and holding by certificate of entry in an official register are closely analogous. It may therefore console the conservative to reflect that the substantive law of property applied equally to land held in freehold and to land held in copyhold tenure, and that the almost entire absence from the reports of suits involving title to copyhold land shows that disputes as to the legal title of such land were extremely rare.

III.

I have not yet spoken of the subject which in discussions of the Torrens system is usually treated first; namely, the method of bringing about the change from the old ways to the new. It seems to me to be a subject of quite subordinate importance. If the result is desirable, we shall not be at a loss to devise means to reach it; while if the result is deemed disadvantageous, no means to it, however seductive, should sway our judgment and induce us to attempt it. The point to be determined, therefore, is not what method is best to bring about a registration of land-titles, but whether such registration is or is not desirable.

But though of subordinate importance, the question of method is in itself well worth considering; though it is of course impossible, within the limits of this article, to do more than state in outline the various plans proposed or in operation. These plans may all be resolved into two,—one looking to an immediate attainment of the new order of things; the other reaching it gradually, after a lapse of time. The former is the method in vogue in the Australian colonies, and may be called the Australian method; the latter is recommended by the Illinois Commission; and the English and Canadian Acts allow a choice of the two methods.

successful test in Rügen and Pomerania. "The practical results obtained in Prussia appear in some respects to be even better" than those obtained in Australia. See an article entitled "Registration of Title in Prussia," 4 *Law Quarterly Review*, 63. A somewhat similar system was in operation in the Netherlands before the time of Napoleon, and still exists in the Dutch settlements of South Africa. 2 *Law Quarterly Review*, 341. According to the method there prevailing, the deed is registered in court, and has the effect of a judgment *in rem*,—valid against all the world. The same method prevails in London, according to the custom of that city. Bohun, *Privilegia Londini*, 241.

The Australian method, then, contemplates the issuance to the applicant of a certificate which is from the beginning such a document as I have already described. The owner of land applies to the registrar to have his land entered in the official register, and at the same time brings in his title-deeds and other evidences of title. The title is thereupon examined by an official examiner, and if passed by him, the applicant is registered as owner. If the title is rejected by the examiner, the applicant is in some colonies allowed an appeal to a court of law; or the title is registered as subject to certain defects, and what is called a qualified certificate issued. If the absolute certificate is issued, the registered owner is henceforth the only legal owner; in short, the Torrens system is in full operation, so far as that land is concerned.

This method may evidently give rise to difficulty. In spite of the vigilance of examiners and the learning of courts, a certificate might be issued to applicant A, though the legal owner of the fee was in fact B; and B, not being a party to the proceedings, would not be concluded by them. Yet the certificate is conclusive, and the legal title now in A; what can be done? B may of course get the land from A, if he can; but it has probably been passed on to a holder for value. The only satisfactory remedy is against the State, whose officials have committed the error. Accordingly one whose land has been entered on the register to another's credit may recover its value from the State; and in order to indemnify the State, every applicant pays a certain percentage of the value of his land to an "assurance fund," from which such claims for loss of land are paid. Compensation to owners who have lost their land is therefore a necessary feature of this method; and an assurance fund is universally provided, though experience shows that demands upon it are extremely rare.

Where the other method of attaining the Torrens system is adopted, the applicant asks the registrar to enter upon the register merely the fact that he is seised of land claiming legal title. He is therefore required to prove only *bona fide* seisin; and upon proof of this a certificate is issued to him, expressly subject to all claims upon the land that existed at the date of the original entry of title. The certificate, in other words, confers upon the applicant no greater title than he previously possessed. The land is henceforth transferred according to the Torrens system; but instead of conferring absolute legal title, registration of ownership confers such title only as the first owner had. If at the time of the first

entry a paramount title existed, it is not at all affected by these proceedings.

This method, then, does not at once accomplish the desired result. It reaches the Torrens system only if the title is good at the time of the first entry, or afterwards becomes so. But the merit of the method is this, that it may be combined with processes already existing in the law to bring about the same result which is immediately but more violently reached by the Australian method. This possessory method, as it may be called, keeps the title as good as it was at the beginning; the proceedings mentioned in Mr. Chaplin's article, and especially the Statute of Limitations, finally perfect the back title. The Statute of Limitations makes a title good; the possessory method keeps it good; and the two combined result in a title as absolute as that obtained by the Australian method. This result is attained by a provision that no action for the recovery of land shall be brought by a paramount owner more than a specified time after issue of the possessory certificate. When that period has elapsed, the certificate becomes therefore absolute.

If the present Statute of Limitations were retained, the result would be deferred for twenty years or more; though meanwhile there would be considerable improvement on the present system. But so long a period is unnecessary in these days of steam and electricity; if twenty years was a just period a century ago, a much shorter time would not be unjust to-day. It is quite possible also to abolish the exceptions for disability in the statute, or at least those for absence and coverture.¹ The Illinois Commission recommend a five-year period of limitations, without exception for disability, giving the owner of a future interest a right, by filing a notice within five years, to bring suit upon the vesting of his cause of action. The result of their proposed method would be to make every certificate absolute in five years after the first entry of the land, unless meanwhile notice of an adverse future interest had been filed.

Certain advantages are gained by the adoption of the possessory method. There is no loss of title by mistake of the registrar, no action against the State, no need of an assurance fund, and no

¹ In England, the period of limitation is now twelve years; the only disabilities are infancy, coverture, and lunacy; and thirty years is the utmost allowance for these disabilities. 37 & 38 Vict. ch. 57.

exhaustive examination of title. The expense of a first entry is therefore small. Another important consideration is this, that it is merely an extension of methods of dealing with land which are now in operation. On the other hand, the Australian method has the advantage, not to be lightly esteemed, of immediate and absolute certainty of title; and this advantage, in the minds of many eminent authorities outweighs all the others.

Joseph H. Beale.

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HUNTINGTON *v.* ATRILL IN THE SUPREME COURT. — A note in our October number referred to the decision of this case in the Judicial Committee of the Privy Council. On December 12 Mr. Justice Gray, on similar facts, delivered the opinion of the United States Supreme Court to the same effect.

A bill was filed in the Circuit Court of Baltimore city to set aside a fraudulent conveyance of stock, and to charge the stock with a judgment recovered against Atrill in New York upon his liability as a director in a New York corporation, under the statute providing that on any false material representation the directors should become personally liable for all debts of the corporation contracted while they were directors. The demurrer to the bill was, as far as the judgment in New York was concerned, on the ground that a judgment for a penalty could have no effect in another State; and this was the ground taken by the Supreme Court of Maryland.

The case comes to the United States Supreme Court on a writ of error, raising the federal question whether the decision of the Maryland court does not violate the provision of the Act of Congress of May 26, 1790, to the effect that the record judgments rendered by a court of any State shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the State where they are taken.

The principal question discussed, — the proper meaning of the word "penal" in international law, — is treated in the opinion with most satisfactory clearness and thoroughness. Marshall's famous maxim, "The courts of no country execute the penal laws of another," has been frequently misinterpreted, the court says, through the various shades of meaning allowed to "penal" in our language. It is commonly used to include the extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered; but strictly and properly, penal laws are "those imposing punishments for an offence committed against the State, and which by the English and American constitu-

tions the executive of the State has power to pardon." It is the same question as whether an offence is in a broad sense civil or criminal, — a wrong to the individual or a wrong to the State, — according to Blackstone's classification. "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." Therefore, though the statute in question, as it imposes a burdensome liability on the offenders, may be called penal in the sense that it is to be strictly construed, it is as to the creditor clearly remedial, relief being at his suit only, and limited to the damages suffered.

The Chief Justice dissents, holding the court has no jurisdiction, as it was for the Maryland court to determine whether the enforcement would involve the penal laws of another State; and State courts do not adjudicate the question of statutory delicts at their peril. No authorities on the point are quoted by the Chief Justice, and his short remarks can take off very little from the weight of the decision. The majority agree fully with the decision of the Privy Council, which they quote at length with approval, that the question of whether a statute is penal is not in any sense local, but one to be decided by the court where the remedy is sought. The Chief Justice goes on to say that full faith and credit were given to the judgment, since it was admitted in evidence. Here, too, he is content to let his statement stand on its own merits. But the provisions of the Constitution of the United States, as the court says, are to be read in the light of established principles; and, against the dissenting judge's bare statement that the Act of Congress was satisfied by merely treating the New York judgment as evidence, the majority opinion quotes many cases to show that, while there are certain limits to the effect to be given foreign judgments (they are not, for instance, on the footing of domestic judgments, and to be enforced by execution), yet, when duly pleaded and proved in the courts of another State, "they have the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby adjudicated."

LEGITIMATED CHILDREN AS HEIRS AND DEVISEES. — At last, in *In re Gray's Trust*, [1892] 3 Ch. 88, the English courts have advanced to the third, and probably their last, position in the long-disputed question of the rights, as heirs and devisees, of children illegitimate by the law of England, but legitimated by the law of the country which saw their birth.

The testator bequeathed a portion of his estate, real and personal, to the children of his son. His son, domiciled in the Cape of Good Hope, had a child by a woman out of wedlock. Subsequently he married the woman. By the Roman-Dutch law of the Cape, this child, although *antenatus*, was legitimated for all purposes by the subsequent marriage. In England, of course, a child *antenatus* is not legitimated by the subsequent marriage of its parents. The question arose as to the child's taking the realty. To take he must be legitimate. But legitimate by what laws?

The questions at one time were whether legitimacy was a personal incident, — a quality of the *status* of the individual following the law of his domicile, — and whether one country should recognize, by the comity

nations, the laws of another country as to *status*. Those are now settled in the affirmative, and are to-day not in conflict. The controversy to-day is, Shall the law require, in addition to legitimacy (a matter settled by the law of the domicile), the other element, — that the person in question be legitimate in the certain way prescribed by the law of England?

There are four forms in which the question arises: (1) May such legitimate child take personalty under the description of "child" in a will? (2) May he take personalty as next of kin to an intestate? (3) May he take realty under the description of "child" in a will? (4) May he take realty as heir to an intestate? The first was settled in the affirmative by *In re Andros*, 24 Ch. Div. 637 (1883); the second in the affirmative by *In re Goodman's Trusts*, 17 Ch. Div. 266 (1881); and the fourth in the negative by *Doe d. Birtwhistle v. Vardill* (1839). The third is now decided in the affirmative, and is the principal case.

The principle of international law on which the first three rest is equally applicable to the fourth, and would prevail in that case were it not for the peculiar feudal quality of common law land, with its tenures and its heirship. That principle is, that those laws of a State which apply to the capacity and personal condition, that is, the *status* of its citizens, attach to and go with them, and will be recognized by foreign States. Legitimacy is a matter of *status*.

In devises its application is simple. The will reads, "to children." The rules of construction of wills do not vary the terms, but simply say the legitimate children shall take. What children of a particular person are legitimate depends upon the law of his domicile.

If the case be one of intestacy, a distinction is to be taken between personalty and realty. Bearing in mind the different starting-points of the laws for the inheritance of realty and personalty, the reason for the difference appears. The heir to realty was one who should be upon the land, and bear its burdens as a feud, and take its profits. His connection with the land was very close. Personalty, however, by the administration of the ecclesiastical courts, was on intestacy, as well as in the case of a will, subjected to the rules of the civil law, with its idea of representation. The common law, moreover, looks upon goods and chattels as moving with the person. On his death intestate, the next of kin took, through the hands of the administrator. The connection of next of kin with the intestate was solely personal. Therefore the laws of *status* of his domicile declare which of his children are legitimate. While he who succeeds to realty, on the other hand, must not only be legitimate, but he must be legitimate *sub modo*, — legitimate in a certain way; the way prescribed by the law of England.

Since there are these reasons for the negative answer to the fourth case, it seems very unlikely that this answer will be changed. Thus all four are at last settled, and satisfactorily, even if the fourth go upon a feudal reason.

RECENT CASES.

AGENCY — LIABILITY FOR TORT — FAILURE OF SERVANT TO COMPLY WITH STATUTE. — A statute of New York provides that any railroad engineer who fails to ring the bell or sound the whistle of his locomotive eighty rods before crossing a high-way shall be guilty of a misdemeanor. *Held*, that a charge to the jury was erroneous which laid down as a rule of law that failure on the part of defendant's engineer to comply with the statute made the defendant liable to a plaintiff injured thereby. *Vandewater v. N. Y. & N. E. R. R. Co.*, 32 N. E. Rep. 636 (N. Y.).

The court say that as the statute imposed a duty on the servant only, his failure to comply did not *per se* make the master liable. It is submitted, however, that this is beside the mark. Failure to comply with the statute undoubtedly made the servant personally liable as for negligence; and the servant was at the time engaged upon his master's employment. The company was of course not liable as for its own negligence, because no statutory duty was imposed on it; but it was liable, because responsible for the acts of its servant.

AGENCY — MISCONDUCT OF AGENT — RIGHTS OF THIRD PERSONS — NOTICE. — A principal in New York supplied his agent with large sums of money, which the agent in Maryland deposited with the defendant bank in his own name as agent. This money was properly used in making loans upon canned goods, of which he took storage receipts in his own name as agent, but which he pledged with the defendant for his personal benefit. *Held*, that the knowledge of the bank of the general relations between the principal and his agent, coupled with the use of the word "agent" on the receipts, was sufficient to put the bank upon inquiry, and that it was liable to the principal for the amount realized from the sale of the goods pledged. The agent also purchased goods with money received by sale of plaintiff's goods, and took storage receipts of the same in his name as agent, and obtained loans upon them for his personal benefit. *Held*, that as the agent had never intended the principal to have these goods, the title was never in the principal, and that the bank was not liable for the amounts advanced on them. *Thurber v. Cecil National Bank*, 52 Fed. Rep. 513 (C. Ct. Maryland).

This decision appears to be correct on principle, although the reason for the second point is highly technical.

BILLS AND NOTES — ANOMALOUS INDORSERS — EXTRINSIC EVIDENCE. — Where a note was made by a corporation, and before delivery the directors signed their names on the back, adding the words "Board of Directors," — *held*, that between the original parties and any holder having notice of the circumstances, extrinsic evidence was admissible to show that it was the understanding of the parties that the directors by their indorsement incurred no personal liability, but merely bound the corporation. *Kline v. Bank of Tescott*, 31 Pac. Rep. 688 (Kansas).

For the authorities on this question, which are somewhat in conflict, see Daniel, *Negotiable Instruments*, § 418. The following are in accord with the principal case: 32 Md. 327; 4 Col. 90; 7 Hun, 367; 49 Mo. 314; 5 Wheat. 336; 66 Cal. 451. But see, *contra*, 17 Ohio St. 125; 9 N. Y. 571.

CONFLICT OF LAWS — EXEMPTION OF DEBTOR — PROPERTY IN ANOTHER STATE. — Where a creditor and a debtor are residents of the same State, a court of equity of that State will restrain the creditor from proceeding in the court of another State to reach by garnishment credits due the debtor there, such credits being exempt from legal process by the laws of the first State, but not by the laws of the second State. *Allen v. Buchanan*, 11 So. Rep. 377 (Ala.).

It is usually held in this country that if a creditor is trying to evade the laws of his domicile he will be restrained, — as where a debt is due his debtor from a corporation having an existence in both States. *Keyser v. Rice*, 47 Md. 203; *Snook v. Svetzer*, 25 Ohio St. 516. The doctrine is commonly stated broadly as in the principal case; but if the property were chattels having an actual *situs* in a foreign State, it is hard to see on what theory a court of equity could interfere. It would really be enforcing the exemption laws of its own State in a foreign State.

CONSTITUTIONAL LAW — ESTATE BY CURTESY — ABOLITION BY LEGISLATURE. — *Held*, (1) that under the Illinois Married Women's Act of 1861, which provided that the lands of married women and all the rents and profits thereof should remain their separate property, under their sole control, and not subject to the husband's control or liable for his debts, the estate of tenancy by the curtesy initiate became a mere expectancy, instead of being, as at common law, a vested estate. (2) Therefore the Dower

Act of 1874, which abolished the estate of curtesy, is constitutional as applied to those who, at the time of its passage, had only an estate by the curtesy initiate under the Act of 1861. *McNeer v. McNeer*, 32 N. E. Rep. 681 (Ill.).

The court treats this statutory curtesy initiate as analogous to dower, which it is well settled may be abolished by statute. *Cooley*, Const. Limit. (6th ed.) 441, and cases there cited.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE TO GRANT SOIL UNDER HARBOR. — By Act of 1869, the Legislature of Illinois granted in fee to the Illinois Central R. Co. the submerged lands, being the bed of Lake Michigan, for a mile from the shore between certain points, "Provided that nothing herein contained shall authorize obstructions to Chicago harbor or impair the public right of navigation, nor shall exempt grantee, its lessees or assigns, from any law regulating rates of wharfage in said harbor." The land thus granted comprised a large part of the harbor of Chicago. *Held*, that this was a grant which the Legislature had no power to make. The lands under navigable waters of the State belong to the State in trust for the public, and the Legislature is bound by this trust. *Shiras, Gray, and Brown, JJ., dissented. Illinois Central R. R. Co. v. State of Illinois*, 13 Sup. Ct. Rep. 110.

The court admits that small portions of lands under navigable waters may be granted to individuals for wharfage purposes, etc.; but it says that a grant of one thousand acres, as in this case, — a grant which gives virtually the whole harbor of a great city, — is beyond the power of any Legislature. The right of control over this harbor is of too vital importance to the people generally to be a subject of bargain and sale by the Legislature. The same principle is at the bottom of this decision as of those in which the Legislature is denied the power to grant away its right to protect the public health and morals.

CONTRACTS — CONSPIRACY — ACTION TO RECOVER MONEY PAID ON AN ILLEGAL CONTRACT. — At the trial it appeared upon the plaintiff's own case that the money sought to be recovered had been paid by him in pursuance of an agreement with one of the defendants, by which the latter was with the money to purchase upon the Stock Exchange a number of shares in a projected company, with the sole object of inducing the public to believe that there was a real market for the shares, and that they were at a real premium, — whereas, in fact, as the plaintiff and defendants well knew, they were not. *Held*, that such an agreement was an illegal transaction, which might be made the subject of an indictment for conspiracy, and that this action, based on such an illegal contract, could not be maintained. *Scott v. Brown, Dowling, McNab, & Co.; Slaughter & May v. Brown, Dowling, McNab, & Co.*, [1892] 2 Q. B. 724 (Eng.).

CONTRACT — PARENT AND CHILD — PRESUMPTION AS TO NATURE OF CHILD'S SERVICES. — In an action by a son against his mother's estate to recover for services rendered her by him while living with her after his majority, — *held* (three judges dissenting), that it was error to charge the jury that there was a presumption of law in favor of the services being gratuitous. *Ulrich v. Ulrich*, 32 N. E. Rep. 606 (N. Y.).

By presumption of law, both courts understood a presumption of mixed law and fact, — an inference which the jury are by law obliged to make, but which is rebuttable. So far as it is possible to extract any definite rule from the books, this case seems to be against the trend of authority. It would seem: (1) that from the mere fact of benefit received by the parent, the law will never raise a quasi-contract — a promise implied *in law* — to pay; nor (2) will the mere fact of benefit received be evidence of a contract implied in fact, — an actual mutual understanding, though not formally expressed, that there shall be compensation; (3) it seems to be held in some courts (see *Mosteller's Appeal*, 30 Pa. St. 473) that even a contract implied in fact will not be sustained, and that there must be proof of an express contract; (4) where the child sets up an express contract, it would seem (though the language of the cases is vague) that he has not only to sustain the burden of establishing his case, but must meet an initial presumption against him. Whether this ought to go as far as a mixed presumption of fact and law, — *i. e.*, whether the principal case does not lay down the better rule, — *quære*. See Schouler on Dom. Rel., §§ 269, 274.

CONTRACTS — PUBLIC POLICY — AGREEMENT NOT TO CHARGE FRAUD. — An agreement contained in a building contract that the architect's certificates and awards shall be final and shall not be objected to for fraud, is binding, and cannot be overturned for fraud on the part of the architect, where it does not appear that the other party to the contract was colluding with him. *Tullis v. Jackson*, [1892] 3 Ch. 441 (Eng.).

The court considers such a contract neither unfair nor against public policy, saying that men's right to make and enforce such contracts as they see fit ought not to be violated save for weighty reasons, and that the increasing stringency of building contracts

indicates the opinion of those conversant with the matter that it is better to run the risk of unfairness than of dispute.

CONTRACTS — RESTRAINT OF TRADE — LIMITATION AS TO TIME OR SPACE — REASONABLENESS. — *Held*, that where a covenant in restraint of trade is general, — that is, without any qualification, — it is bad, as being unreasonable and contrary to public policy; but where it is subject to a qualification of either time or space, and so only partial, then the question is whether it is reasonable, and if reasonable, it is good in law. *Held*, accordingly, that a contract by the defendants with the plaintiff corporation, which carried on a business consisting of the manufacture and sale of dye products, with branches and agents throughout the world, that after leaving the plaintiff's employ as agents, the defendants would "not enter into any like or similar business, nor start a business of that kind themselves, nor give information of any kind about the business" for three years, was good, and enforceable in equity. *Badische Anilin und Soda Fabrik v. Schott, Segner, & Co.*, [1892] 3 Ch. 447 (Eng.).

Compare *Oliver v. Gilmore*, *infra*, where a contract no broader than this between parties occupying a different relation to each other was held bad.

CONTRACTS — RESTRAINT OF TRADE — PUBLIC POLICY. — *Held*, that a contract between manufacturers, whereby the first party agrees, in consideration of a percentage on the sales made by the second party, not to use his plant for the production of strap and "T" hinges for five years, the contract to be void in case the second party increase his facilities for the production of such hinges, is void, as against public policy. *Oliver v. Gilmore*, 52 Fed. Rep. 562 (Mass.).

Compare the English case of *Badische Anilin und Soda Fabrik v. Schott, Segner, & Co.*, *supra*, where an equally broad contract between parties occupying a different relation from the parties in this case was held good.

CORPORATIONS — DISCRIMINATING CONTRACTS — PUBLIC EMPLOYMENT. — *Held*, (1) That the passage by a corporation of a by-law forbidding its members from dealing with a certain person gives no right of relief to the latter, since contracts in restraint of trade are illegal only in the sense that the court will not enforce them. (2) That the fact that the business at certain stock-yards is so large that it exercises an influence over the business of the whole country does not justify the courts in declaring such business public, and in applying different rules to its conduct than are applied elsewhere in similar business. *Am. Live Stock Com. Co. v. Chic. Live Stock Exchange*, 32 N. E. Rep. 274 (Ill.).

On the second point the court distinguishes *Munn v. Illinois*, 94 U. S. 113, on the ground that in that case the question was whether the Legislature had power to declare a certain business to be of sufficient public importance to warrant the putting of it under public control. The court in the principal case say that this is a question of public policy which the Legislature, not the court, is to settle.

The case of *N. Y. & Chic. Grain Exchange v. Board of Trade*, 127 Ill. 153, is distinguished, on the ground that there the corporation had voluntarily assumed the performance of certain duties towards the public at large, and in so far the interests of the public could be protected.

CORPORATIONS — NEGOTIABILITY OF STOCK CERTIFICATES INDORSED IN BLANK — ESTOPPEL BY NEGLIGENCE. — R bought stock certificates indorsed in blank, and placed them in his safety deposit box. W, who used the box in common with R, and had access to it, stole the stock and sold it to L, an innocent purchaser for value. *Held*, that certificates of stock were not negotiable instruments; that therefore the ordinary rule as to stolen property applied, and L took no title; and that under the circumstance, R's act in leaving the stock indorsed in blank was not so negligent as to raise an equity against him in behalf of L, who had suffered as a result of his act. *Bangor Electric, &c. Co. et al. v. Robinson et al.*, 52 Fed. Rep. 520 (C. Ct. Mass.).

Daniel on Negotiable Instruments (4th ed.), §§ 1708, 1709, is cited with approval on the question of the non-negotiability of stolen certificates of stock indorsed in blank. There is very little authority in this country on this point.

CRIMINAL LAW — RIGHT OF ACCUSED TO CHALLENGE JURORS. — In a capital case the judge directed that two lists of the panel of jurors should be made out and given to the respective parties, each of whom was required to challenge, without knowing what persons were challenged by the other side. On defendant's exception to this order, *held*, that it was reversible error, because in a capital case it is the defendant's right to be confronted with the panel of jurors, and to have all challenges made in his presence. Brewer, J., *dissented*, on the ground that there was nothing in the record to show that defendant was not present when the challenges were made. *Lewis v. United States*, 13 Sup. Ct. Rep. 136.

Shiras, J., who delivered the opinion, laid great stress on the right of defendant to be present at every step in the proceedings after indictment found. He said that the record did not show affirmatively that defendant was present at the challenging, and therefore the court would set the judgment aside.

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — *Held*, that in a trial for murder by poisoning, evidence that the deceased at different times within a short time of his death and before his last sickness threatened to commit suicide is incompetent, as hearsay. *Siebert v. People*, 32 N. E. Rep. 431 (Ill.).

This decision, handed down on Oct. 31, 1892, follows with approval *Commonwealth v. Felch*, 132 Mass. 22, in ignorance of the fact that that case had been overruled less than a fortnight before. See *Commonwealth v. Trefethen*, 32 N. E. Rep. 961 (Oct. 20, 1892); and 6 Harvard Law Review, 266.

EVIDENCE — HYPOTHETICAL OPINION AS TO VALUE OF LAND. — In an action for damages by an abutting owner against a street railway company for failure to build a railway past plaintiff's land according to agreement, *held*, that opinion evidence was admissible to show what the value of the plaintiff's land would have been if the contract had been performed. *Blagen v. Thompson*, 31 Pac. Rep. 647 (Oregon).

This is in accord with the weight of authority; but in New York an opposite rule obtains. See 128 N. Y. 455.

HUSBAND AND WIFE — PRESUMPTION OF SURVIVORSHIP IN PERSONALTY. — A and his wife each invested \$3,000 in a bond and mortgage executed to them jointly. On A's death, *held*, that no presumption arose that either intended a gift to the other, and consequently that they took as tenants in common and without survivorship. *In re Albrecht's Estate*, 32 N. E. Rep. (N. Y.).

In purchases of realty, it has been held in New York that there is a contrary, but very slight, presumption; namely, that a tenancy by the entirety is intended. (See 92 N. Y. 152; 133 N. Y. 308.) The present decision seems sensible wherever married women have the same rights in regard to their property as though sole; but the only other case on the point appears to be 35 Mich. 425.

PARTNERSHIP — INCOMING PARTNER — RIGHTS OF PREVIOUS FIRM CREDITORS. — C was admitted to the firm of A, B, & Co. He brought no new capital into the firm, and it was tacitly assumed that the firm assets and liabilities were to continue unchanged. The firm in its new form, being insolvent, made an assignment, giving preferences to a debt incurred before C entered the firm. *Held*, that the assignment was valid; for, as regards creditors, firm property belongs to the firm as an entity, and the firm creditors' right to priority in payment from this fund is unaffected by a mere change in the *personnel* of the firm. *Peyser v. Myers*, 32 N. E. Rep. 699 (N. Y.).

The court treats the firm as existing as one distinct entity throughout, and holds that it is unnecessary to show either that there was a novation at C's entrance, or that the firm, with C as a member, made a promise for the benefit of creditors of the old firm (*Lawrence v. Fox*, 20 N. Y. 268). The case is weakened as an authority by the fact that the firm, unknown to itself, was insolvent when C became a member, two years before the assignment. *Menagh v. Whitwell*, 52 N. Y. 146, is cited with approval.

QUASI CONTRACT — PAYMENT BY MISTAKE — DOCTRINE OF PRICE *v.* NEAL. — Plaintiff had indorsed certain paper for accommodation in the belief that it was negotiable, and that he was thus secured by certain property for which it had been given. The paper was discounted by the defendant bank, also in the belief that it was negotiable; and the other parties failing to meet it when due, plaintiff paid a part, and refused to pay the rest. The bank sued, and was defeated, on the ground that the paper was not negotiable. Plaintiff then sued the bank for the amount which he had already paid, basing his claim on the ground that he had paid under the mistake that he was secured by the property for which the paper was given. *Held*, that he could not recover. *Alton v. First Nat. Bank of Webster*, 32 N. E. Rep. 228 (Mass.).

The decision of this case is clearly right. Its interest comes from the fact that it is a decision in addition to that in the case of *Fort Dearborn Nat. Bank v. Carter, Rice, & Co.*, 152 Mass. 34, with which the Massachusetts court will be confronted when it is called on to pass again on a case like *Welch v. Goodwin*, 123 Mass. 171, or *Merchants' Nat. Bank v. Nat. Eagle Bank*, 101 Mass. 281. Holmes, J., in his opinion in the principal case, expressly states that so far as that case is concerned "it does not matter whether the mistake was a mistake of fact or of law." If the point that the mistake is one of law is waived, it is difficult to distinguish the principal case, where the plaintiff has paid in the faith that he is secured by collateral which goes with a note, from the case of the *Merchants' Nat. Bank v. Nat. Eagle Bank*, where plaintiff paid in the be-

lief that it had deposits sufficient to cover the draft; or the case of *Welch v. Goodwin*, where the plaintiff paid in the belief that he was meeting the obligation which was really outstanding against him. The principle is the same as that of *Price v. Neal*. (See 4 Harvard Law Review, 497.) As between two parties whose equities are equal, the courts will not deprive a defendant of his legal advantage.

QUASI CONTRACT — RECOVERY OF EXCESSIVE FREIGHT. — A railroad company contracted with defendant that it would charge to all other shippers a certain rate double the charge on defendant, and would pay to him one half of this excess when collected. The consideration for the contract was a promise by defendant to build and maintain a system of pipe lines along the road. Plaintiff, in ignorance of this arrangement, paid freight to the company, which paid to defendant the amount agreed on. *Held*, that the contract between the company and defendant was void, as against public policy, and that plaintiff could recover, in an action for money had and received, the part of the excessive charge which defendant received, for the reason that it was "against good conscience" for defendant to retain this money. *Brundred v. Rice*, 32 N. E. Rep. 169 (Ohio).

The court evidently treated the arrangement between defendant and the company as a wrong to plaintiff, so that there was a constructive trust in favor of the latter on funds which defendant received under the contract. The difficulty with that view is that defendant never in fact received plaintiff's money. That was paid into the general funds of the company, where its identity was lost. Plaintiff could not possibly show that defendant received *his* money. Without proving this, it is submitted that no *res* can be shown for a constructive trust.

Another possible theory is submitted. Defendant and the company, having wronged plaintiff, were liable to an action of tort. But plaintiff has waived his right to bring an action of tort, and has elected to sue in money had and received for the proceeds of the tort received by defendant. It is clear that the sum paid to defendant was paid to him as the direct fruit of his tort, although it is not plaintiff's own money. Any objection on the ground of the form of action would seem very technical to-day. It seems no harder to allow "money had and received" in this case than to allow a plaintiff whose property has been converted to waive the tort and sue on a count for goods sold.

REAL PROPERTY — ADVERSE POSSESSION. — Where a strip of land was occupied for the statutory period under a mistake as to the true boundary line, and without any intention to claim title to any land not embraced within the original deed, *held*, that a title by adverse possession was not obtained. *King v. Brigham*, 31 Pac. Rep. 601 (Oregon).

The doctrine laid down by this case originated in *Brown v. Gay*, 3 Greenl. 126, which was followed in 33 Ala. 38; 28 Mo. 481; 39 Vt. 579; 34 Iowa, 148; and 35 Kan. 85; but see, *contra*, 8 Conn. 439; 30 Ohio St. 409; 31 Minn. 81; 73 Me. 105; 69 Ala. 332; 70 Mo. 372; and 22 N. Y. 170. It is submitted that the latter authorities are correct. There was, in fact, a claim of title to the actual land, though there would not have been except for a mistake of fact. It would follow from the principal case that adverse possession can be effective only if it is dishonest.

REAL PROPERTY — APPROPRIATION OF WATER RIGHTS — MEASURE OF DAMAGES. — In an action against the town of Randolph and others, for value of plaintiffs' water right taken by the towns under authority of a statute, *held*, that no reduction in damages should be allowed for the water which was returned to the stream by percolation, so as to become available for mill purposes. The damages to be assessed are not what the plaintiffs have suffered merely, but all that will arise in the future as well. The amount of water which may be returned in the future cannot be estimated. The defendants have the right to divert all the water, and may do so. Hence, damages are to be assessed on that basis. Allen, Knowlton, and Barber, JJ., *dissent*, on ground that if damages are assessed on the basis given, the plaintiffs will receive compensation for the loss of water which they actually will continue to use. *Proprietors of Mills v. Inhabitants of Randolph*, 32 N. E. Rep. 153 (Mass.).

REAL PROPERTY — LEASE VOID UNDER STATUTE OF FRAUDS — TENANCY FROM YEAR TO YEAR. — The Minnesota statute requires that all leases of one year or more, to begin *in futuro*, shall be in writing. Defendant agreed to occupy plaintiff's building for at least one year. He remained more than two years, paying rent monthly. After a month's notice to quit, the landlord brought action for possession. The tenant set up the parol lease in order to show that he was entitled to notice as under a holding from year to year. *Held*, that "at no time can a parol demise void under the Statute of Frauds be resorted to for purpose of ascertaining the duration of the term." *Johnson v. Alberton*, 53 N. W. Rep. 642 (Minn.).

It is submitted that though the agreement for a lease for years be not admissible against the lessor to show the number of years for which lessee is to hold, it is admissible to show whether or not there was a payment of rent with reference to a yearly holding; *i.e.*, whether a tenancy from year to year was created. Compare *Doe d. Rigge v. Bell*, 5 T. R. 471, and note to that case in 2 Smith's Lead. Cas.

The language of the court is inconsistent with *Doe d. Tilt v. Stratton*, 4 Bing. 446, where defendant entered under an agreement for a lease for seven years, and it was held that at the end of the seven years the contract itself gave defendant sufficient notice to quit.

REAL PROPERTY—WILLS—ADVANCEMENT.—A father gave property by deed and will to each of his children except the two plaintiffs, reciting in both deed and will that this was all he intended these children to take from his estate. As to the rest of his property, he died intestate. The defendants claimed that there was an implied devise to them of the residue. *Held*, that notwithstanding the words of exclusion, the undisposed portion of the estate should be divided among all the children, the gifts previously made being treated merely as advancements. *Phillips v. Phillips*, 20 S. W. Rep. 541 (Ky.).

REAL PROPERTY—WILLS—EXECUTORY DEVISE.—A testator devised a freehold estate to his son for life, and after his death to all children of his son who should reach twenty-one, in equal shares as tenants in common. By a subsequent clause, he directed that if the son's estate should be taken in execution for debt, it should cease, and the property should vest in the persons who would under the previous limitations be next entitled to it. The son's estate was taken in execution, and the only child who had reached twenty-one brought a bill, praying a declaration that she was absolutely entitled to the whole estate in fee. *Held*, that although the first limitation to the children, coming after the end of the life estate, must be a remainder, so that, being a contingent remainder, only those children could take who by reason of having reached twenty-one had vested interests at their father's death, yet the second limitation, since it cut short the father's life estate, was an executory devise, and the estate which vested in the one child who had reached twenty-one would open and let in all the children who attained twenty-one at any time hereafter. *Blackman v. Fysh*, [1892] 3 Ch. 209 (Eng.).

STATUTE—CONSTRUCTION—CORRELATIVE OBLIGATIONS WHICH ARE NOT CONTRACTS.—By Acts passed in 1867 and 1881, the Richmond Gas Company was required to supply gas to the public lamps in the parish of Richmond, and the charge for supplying such gas was fixed at a certain annual sum per lamp; the lamps to be lighted from sunset to sunrise, and the burners used to consume not less than a certain amount per hour. During the months of December, 1890, and January, 1891, in consequence of exceptional frost, the pipes became blocked with ice, and the supply of gas to the public lamps was insufficient. *Held*, that the relation between the parties was not a contractual relation, but that an absolute statutory obligation was imposed on each, and that the corporation of Richmond were bound to pay the fixed annual sum in respect of such lamps, notwithstanding the insufficiency of the supply of gas. *In re Richmond Gas Co. and Mayor, etc., of Borough of Richmond*, [1893] 1 Q. B. 56 (Eng.).

TORT—NUISANCE—DAMAGE TO REALTY.—*Held*, that there is a distinction between injuries which affect the air merely by way of noises and disagreeable gases, resulting in personal discomfort, and those which injuriously affect the land itself, or structures upon it. As to the former, each person, living in society must submit to a degree of discomfort, depending in some measure upon the circumstances of his environment. As to the latter, the owner or occupant of land is entitled to enjoy it free from any direct injury which will appreciably affect its value. *Hennessey v. Carmony*, 25 Atl. Rep. 374 (N. J.).

The Supreme Court of New Jersey adopt, in this case, the distinction laid down by Lord Westbury in *Smelting Co. v. Tipping*, 11 H. L. Cas. 642 (S. C. 11 Jurist N. S. 785).

TRUSTS—RESULTING TRUST BECAUSE OF FIDUCIARY'S FRAUD.—A and B agreed to buy certain land in common, taking the title in the name of B's wife as trustee, and A gave B two negotiable bonds with which to pay for A's share. The vendor refused to accept the bonds; B then borrowed the necessary money from his wife, and paid cash for the land. Afterwards B sold the bonds in his wife's name, and turned over to her the money thus realized. *Held*, that the wife was trustee of the land for A; for although neither the bonds themselves nor the money netted by their sale was used in payment, still, in effect, the money paid was the product of the bonds, because the wife's

advance was made on the bonds as security, with the privilege of selling them for reimbursement. *Hill v. Pollard*, 32 N. E. Rep. 564 (Ill.).

It is submitted that the court could have made a shorter cut to its decision by saying simply that a fiduciary must not compete with his principal.

REVIEWS.

THE LAWS OF ELECTRIC WIRES IN STREETS AND HIGHWAYS. By Edward Quinton Keasbey, of the New Jersey Bar. Chicago: Callaghan & Co. 1892.

"It is always interesting to observe the manner in which the courts deal with new inventions and apply old principles of law to new conditions," writes Mr. Keasbey (who graduated from Harvard Law School in 1871), in the preface to this really valuable book. Some idea of the rapid growth of the law on this subject may be gathered from the fact that Scott and Jarnagin, in their work on Telegraphs, written in 1868, refer to the rights of abutting owners against companies who erect poles and stretch wires along the roads and streets as one of speculation rather than practical interest, and cite no cases; and as late as 1883 there had been few, if any, decisions upon the question. The chapters treating of the conflict of authority upon the rights of abutting owners are the most useful and interesting of Mr. Keasbey's book. On the one hand, the Supreme Courts of Missouri, Massachusetts, and Louisiana have held that the electric telegraph wire is not a new burden upon the land adjoining the highway, on the ground that the telegraph is merely a new means of using the old easement of communication, — an analogy which seems very artificial. On the other hand, the Supreme Courts of New York, New Jersey, Minnesota, Illinois, Ohio, Virginia, Maryland, and Mississippi, and such writers as Lewis and Dillon, maintain that the telegraph poles and wires are an additional burden, for they form no part of the public highway, and, as a means of transmitting intelligence, are so wholly different from the post-boy and stage-coach that they could not have been contemplated by the landowner at the time of dedication or condemnation. Mr. Keasbey says it is not yet safe to predict which of these two views will finally prevail. The old distinction with respect to the title to the land has been shown to be of no value; and future judicial opinion, following the rule laid down by the New York Court of Appeals in the Elevated Railroad Cases, will be based, it is to be hoped, on the question whether the privileges of the abutting owner are affected, and the further question, What is the scope of the uses and purposes of a public street?

Whether the electric street railway will occupy the legal position of the horse and cable railway is still doubtful; but the most recent decisions would lead one to answer in the affirmative. Mr. Keasbey thinks that it might tend to a reconciliation of the cases, and the adoption of a uniform rule, if the question of new burden were, as Chief Justice Campbell, of Michigan, suggests, left on one side, and attention were directed to the practical question mentioned above, — whether the rights and privileges of abutting owners were injured by the operations of the railway.

Any one interested in the application of common law principles to what are perhaps the most wonderful of modern conditions, will find in Mr. Keasbey's book a clear and unprejudiced exposition of the conflicting decisions upon the subject, and many valuable suggestions as to the future trend of the law.

G. T. H.

SOHM'S INSTITUTES OF ROMAN LAW. Translated by James C. Ledlie, of the Middle Temple, and of Lincoln College, Oxford; with an Introductory Essay by Dr. Erwin Grueber, University Reader in Roman Law, Oxford. One volume, pages xxxv, 521. Oxford: Clarendon Press.

It is seldom that a work so admirable comes to hand, — scholarly, scientific, and original. The name of the author, Prof. Rudolph Sohm, of Leipsic, a light in Germany to-day, and recognized as an authority on Roman law, insures its character and value. The style, excellent, if a trifle brilliant, is reproduced in the translation. Dr. Grueber's valuable essay, giving a history of the study of Roman law in its various stages both on the Continent and in England, and of the treatment and evolution of the Institutes, is a separate work rather than an introduction or aid to the main book.

To those familiar with the German works it is scarcely necessary to say that, based on the Institutes of Justinian, this is an exposition and commentary of the Roman law in its final rounded and perfected state, moulded by the *lex gentium*. Professor Sohm gives much space to the growth and change of principles and propositions, and, with wise suspense, holds their final statement until the later Empire's refined body of equitable doctrines has given its final touch.

There is a decided departure, not only from the original arrangement of the Institutes, but also from their present accepted arrangement. The order introduced by A. Heise, and commonly followed to-day, is: —

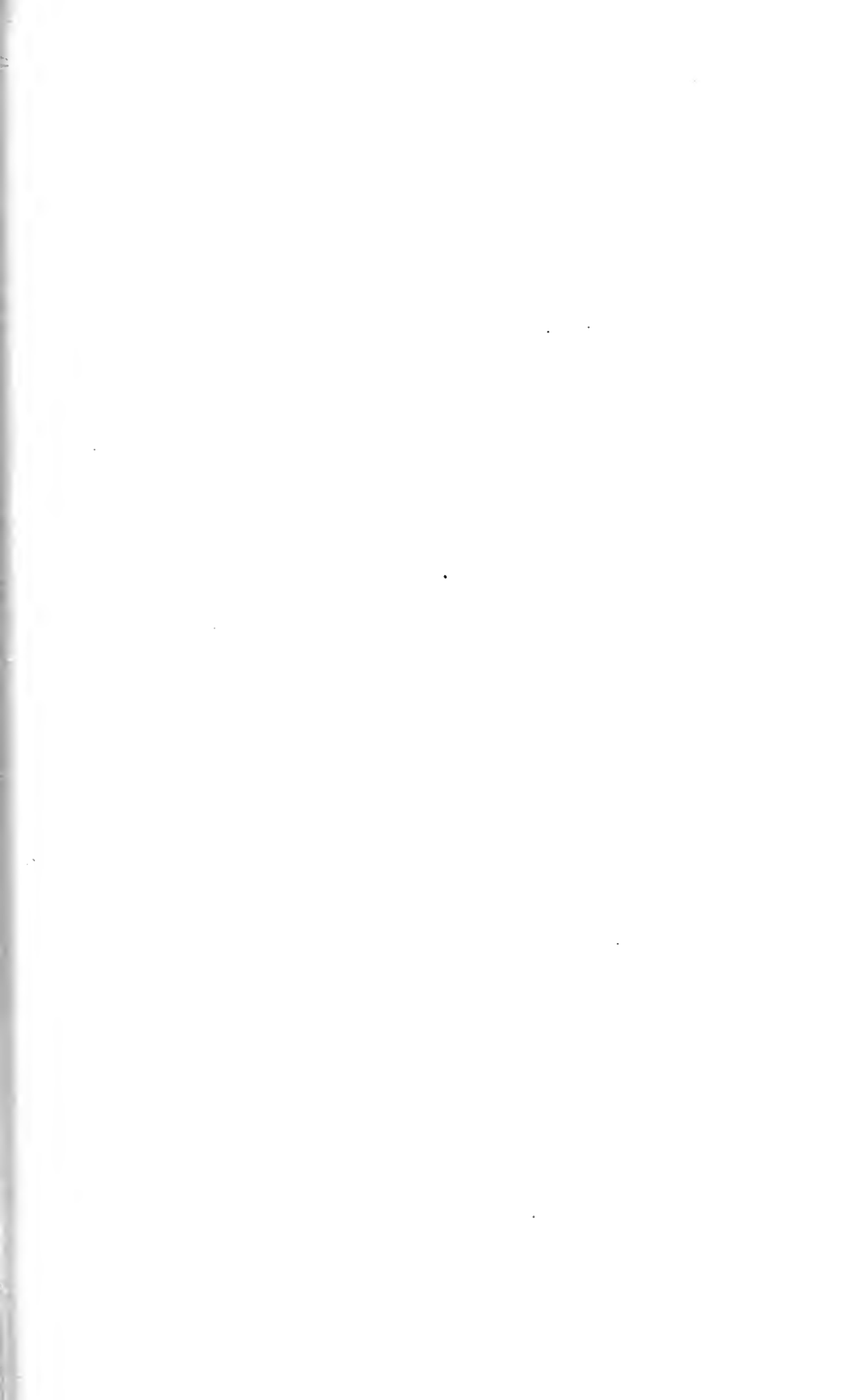
1. A general introductory part.
2. The Law of Things, comprehending ownership and rights over the property of others.
3. The Law of Obligation, including Contracts and Delicts.
4. The Law of the Family, regulating the relations of husband and wife, of parent and child, of guardian and ward.
5. The Law of Inheritance, Testamentary and Intestate Succession.

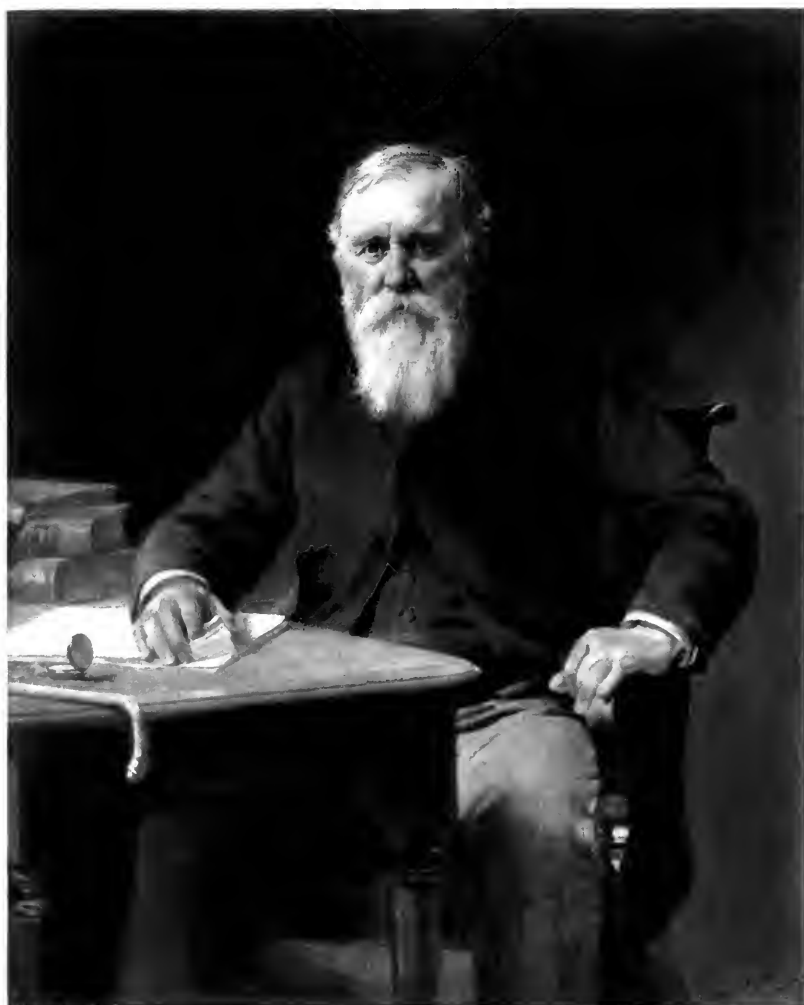
Professor Sohm, asserting that the person is to be taken into account in his capacity of holding property only, *i. e.*, as a subject or bearer of rights of property, and that the family law, on principle, has nothing to do with the family relations themselves, classifies as follows: —

1. The Law of Persons.
2. The Law of Property.
3. The Law of Family and Inheritance as the law affecting property as a whole.

Whether this classification is in harmony with the views of the Roman jurists, I shall not attempt to say. Dr. Grueber doubts.

J. C.





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CONTRACTS IN EARLY ENGLISH LAW.

THE law of contract holds anything but a conspicuous place among the institutions of English law before the Norman Conquest. In fact, it is rudimentary. Certain provisions which may seem at first sight to show considerable development in this direction turn out, on closer scrutiny, to have a wholly different bearing. There are many ordinances requiring men who traffic in cattle to make their purchases openly and before good witnesses. But they really have nothing to do with enforcing the contract of sale as between the parties. Their purpose is to protect an honest buyer against possible claims by some third person alleging that the beasts were stolen from him. If the Anglo-Saxon "teám" was an ancestor of the Post-Norman law of warranty in one line, and of rules of proof, ultimately to be hardened into rules of the law of contract, in another, the results were undersigned and indirect. Anglo-Saxon society barely knew what credit was, and had not occasion for much regulation of contracts. We find the same state of things throughout northern and western Europe. Ideas assumed as fundamental by this branch of law in modern times, and so familiar to modern lawyers and men of business as apparently to need no explanation, had perished in the general breaking up of the Roman system, and had to be painfully reconstructed in the Middle Ages. Further, it is not free from doubt (though we have no need to dwell upon it here) how far the Romans themselves had attained to truly general conceptions. In any case, our

Germanic ancestors, not only of the Carolingian period, but down to a much later time, had no general notion whatever of promise or agreement as a source of civil obligation. Early Germanic law recognized, if we speak in Roman terms, only Formal and Real Contracts. It had not gone so far as to admit a Consensual Contract in any case. Sale, for example, was a Real, not a Consensual transaction. All recent inquirers, I believe, concur in accepting this much as having been conclusively established by Sohm.

The process of arriving at a law of simple contracts was different in England and on the Continent, although some curious partial coincidences may be found. Both here and on the mainland the secular courts were put on their mettle, so to speak, by the competition of the spiritual power. The canonists, possibly taking up some popular survival of the Roman tradition (a very ancient one), expressed in the cult of *Fides* and the consecration of the right hand in the office of plighting troth,¹ proclaimed that "*fidei laesio*," "*fidem fallere*," was a mortal sin, — a sin to be visited, on due proof, with censure and excommunication. Between breach of oath and breach of plighted word it was only a difference of degree, — "*inter simplicem loquelam et iuramentum non facit Deus differentiam*." In Italy, where the tradition of classical Roman law never became quite extinct, the development of this doctrine was to some extent checked by the difficulty of stating it in a Roman form of plausible appearance even for the use of ecclesiastical judges;² while, on the other side, the problem for the civilian lawyer was to find means of expanding or evading the classical Roman rules, and open the door of the secular tribunal to formless agreements by practically abolishing the Roman conception of "*nudum pactum*." In England the Court Christian was early in occupation of the ground, and bold in magnifying its jurisdiction. The king's judges were rather slow to discover how great and profitable a field their rival was occupying. The problem was not faced until the common-law system of pleading was mature; and

¹ This is not the place for a digression on Roman legal antiquities. *Fides* is the special name of *iustitia* as applied *creditum in rebus*, Cic. Orat. Part. c. 22, § 78, cf. D. 12. 1. de r. c. l. [*Populus Romanus*] omnium maxime et praecipue *Fidem* coluit, Gell. 20, 1. See Muirhead, Private Law of Rome, 149, 163; Dion. H. 2. 75; Livy, 1. 21, § 4; and (as to the right hand) Plin. H. N. xi. 45, 103, Servius on Aen. 3. 607; E. Pacchioni, *Actio ex sponsu* (repr. from *Archivio Giuridico*), Bologna, 1888, on the distinct history of the Stipulation.

² Seuffert, Zur Gesch. der obl. Verträge, Nördlingen, 1881 (*q. v.* for the whole history), p. 66.

the thing sought was then to invent a new cause and form of action within limits that were no longer wide.

In Italy we find some jurists holding that an action *de dolo* will lie for damage caused by breach of an informal pact.¹ This offers a striking parallel to the influence of the action of deceit in forming the English doctrine of *assumpsit*, which is now put beyond question by the researches of Judge Hare and Mr. Ames. But the method which found most favor among the Italians was to hold that an additional express promise ("*pactum geminatum*" or "*duplex*") was a sufficient "clothing" of the natural obligation arising from a "*nudum pactum*" to make it actionable. The formerly current² opinion in the common law that an express promise, founded on an existing moral duty, is a sufficient cause of action in *assumpsit*, is not unlike this. Gradually the Northern nations followed suit; the French lawyers of the sixteenth century, going back as humanists to the original Roman authorities, held out latest of all. From the seventeenth century onwards, German writers boldly appealed to the law of nature. The modern philosophic lawyers of Germany do not seem wholly satisfied with the results.³ I am not aware of any evidence that our common lawyers knew or cared what was happening among Continental civilians, or that English canonists, who had already taken their own line, troubled themselves about it. For the purposes of our own history we shall be safe, I think, in confining our attention to English authorities.

There is really no sure standing-ground earlier than Glanvill, and we may begin with Glanvill accordingly. The title of his tenth book is "*De debitis laicorum quae debentur ex diversis contractibus, videlicet ex venditione, emptione, donatione, mutuo, commodato, locato, conducto, et de plegiis et vadiis sive mobilibus sive immobilibus, et de cartis debita continentibus.*" It will be observed that this includes the law of pledge and mortgage, which we now regard as belonging to the law of property rather than of contract. Why Glanvill used the word "*laicorum*," at first sight pointless to modern eyes, will soon enough appear. The promise of the title is but scantily fulfilled. Nothing is said of grants or gifts, and very little of hiring or the divers forms of loan. In fact, the use of the terms *mutuum*, *commodatum*, *locatum*, *conductum*, is a mere

¹ Seuffert, *op. cit.* 77, 80.

² Note to *Wennall v. Adney*, 3 Bos. & P. at p. 249; 6 R. R. at p. 782.

³ Seuffert, *op. cit. ad fin.*

flourish to show the clerical reader that the king's lawyers could speak his own language with him if they chose. What we really gather from Glanvill's exposition is, positively, a classification of modes of proof; negatively, the assurance that the king's court did not concern itself with ordinary matters of contract. "*Privatas conventiones non solet curia domini regis tueri.*"¹ It admitted, in general, only two kinds of proof, — the defendant's deed, and trial by battle.² There is no sign as yet, of any desire to extend the jurisdiction. Four ways of creating an obligation seem to be recognized; not meaning necessarily, nor even usually, an obligation which the king's court will enforce. These are "*plegiorum datio*," "*vadii positio*," "*fidei interpositio*," "*cartae expositio*." It is needless to say much here about the validity of sealed writing, which in its earlier history, like so much else in archaic jurisprudence, appears rather as matter of evidence than as a substantive part of law. The defendant's deed is a solemn admission;³ and, according to the general habit of archaic law, when it has once established itself as a mode of proof, it is conclusive, or all but conclusive. Thenceforward it is only a short step to holding as matter of law that a deed has an operative force of its own which intentions, expressed never so plainly, in other ways have not. With regard to sale and pledge we get a certain amount of substantive information. The contract of sale, as presented by Glanvill,⁴ is thoroughly Germanic. Scraps of Roman phraseology are brought in, only to be followed by qualification amounting to contradiction. To make a binding sale there must be either delivery of the thing, payment of the whole or part of the price, or giving of earnest. The specially appointed witnesses of the Anglo-Saxon laws provide, of course, not an alternative form or evidence of the contract, but a collateral precaution. In substance, these are the very conditions

¹ x. 18, cf. c. 8: "*Curia domini regis huiusmodi privatas conventiones de rebus dandis vel accipiendis in vadium, vel alias huiusmodi, extra curiam sive etiam in aliis curiis quam in curia domini regis factas tueri non solet nec warrantizare.*"

² x. 17.

³ Cf. Salmond, *Essays in Jurisprudence and Legal History* (London, 1891), 14, 44 *seqq.*

⁴ x. 14. "*Perficitur autem emptio et venditio cum effectu ex quo de pretio inter contrahentes convenit, ita tamen quod secuta fuerit rei emptae et venditae traditio, vel quod pretium fuerit solum totum sive pars, vel saltem quod arrhae inde fuerint datae et receptae.*" Sir E. Fry's remark, *Howe v. Smith* (1884), 27 Ch. Div. 89, 102, on the supposed Roman derivation of the old law as to earnest-money, as stated substantially to the same effect by Bracton, cannot be supported in face of the manifestly non-Roman character of the other rules.

which the Statute of Frauds allows as alternatives to a note or memorandum in writing in the case of a sale of goods within the seventeenth section. Observe that the giving of earnest is treated as quite a different thing from part payment. Earnest, as the modern German writers have shown, is not a partial or symbolic payment of the price, but a distinct payment for the seller's forbearance to sell and deliver the thing to any one else. In the Statute of Frauds, five centuries later, "something in earnest to bind the bargain" and "part payment" are distinguished; indeed, but thrown into the same clause as if the distinction had ceased to be strongly felt. In Glanvill's time earnest was still, as it was by early Germanic law everywhere, less binding than delivery or part payment, for if the buyer did not choose to complete, he only lost the earnest he had given. The seller had no right to withdraw from the bargain, but Glanvill leaves it uncertain what penalty or compensation he was liable to pay. In the thirteenth century¹ Bracton and Fleta state the rule, probably a very old one, that the defaulting buyer must repay double the earnest; in Fleta the law merchant is said to be much more stringent, in fact prohibitory, the forfeit being five shillings for every farthing of earnest. There was no machinery, it will be remembered, for assessing damages; and this also explains why the only remedy on what we now call an express warranty of soundness² was to return the object (assumed throughout to be a horse or head of cattle), and sue in debt for the price if it had been paid. In case a third party claimed the object as stolen from him, the seller must be prepared either to warrant the buyer's right, or, if he refuses to do this, to be himself impleaded by the buyer, with the possible end of a trial by battle.³ There was certainly no question of property passing before actual delivery. Such a question would indeed not have been intelligible at a time when property was in no way distinguished from the right to possession. We are told that the thing was at the risk of the party in possession.⁴ Bracton and Fleta repeat this, and seem not to allow that the contract was complete without delivery, even when the whole price was paid.⁵

¹ Bracton, fo. 61 b, 62 a; Fleta, l. 2, c. 58.

² "Si venditor ipse rem suam vendiderit emptori tanquam sanam et sine mahemio."

³ Glanv. x. 15.

⁴ "Periculum autem rei venditae et emptae illum generaliter respicit qui eam tenet, nisi aliter convenerit."

⁵ In Madox, Form. Ang. 167, we have a sale of 40*l.* worth of growing crops with receipt in the body of the deed for "unum denarium ratione Ernesti super vendicionem

Glanvill's chapters on pledge and mortgage¹ give us to understand that the king's court did not accept cognizance of such matters, except so far as the contract might lead to a direct claim to recover possession of the goods or land put in pledge, or to hold the pledge free from the debtor's claim to redeem. Both ecclesiastical and secular authority regarded usury as unlawful, if not punishable, and as involving the true mortgage, *mortuum vadium*, in its condemnation.² Accordingly, interest was pretty high, and the censure of the law was evaded by conveyancing devices not unworthy of a more refined age.³ Pledge, with surety, represents the earliest known Germanic form of obligation.⁴ It seems that the duty of paying wergild was that which first led to a legal process of giving credit. Where the sum due was greater (as must have often happened) than the party buying off the feud could raise forthwith, or at any rate produce in a convenient form, he was allowed to pay by instalments on giving security, originally in the form of actual hostages. It is of some importance to note that the original surety is a hostage or living pawn, not an auxiliary contracting party. The transaction, in fact, is not at this stage a contract at all, it is only a stay of execution upon terms. But the roots of credit and contract are there. Gradually material security is substituted for the living hostage, and we have the conception of "wed," or "vadium," as an operative legal form for binding a bargain. At last the security is no longer even a substantial pledge; the contract becomes purely symbolic or formal. A stick, or even a hair from the promisor's beard, will serve; and the current etymology of *stipulatio* from *stipula* helps Romanized clerks to a queer amalgamation of the Germanic transaction "per festucam" with the Roman formal contract.⁵ A curious connection with the religious obligation by faith-plight, to which we come

praedictam;" the crops not to be removed till the price is paid. This is well into the fourteenth century (15 Ed. II., A. D. 1321). Cf. 17 E. IV. 1, discussed in Blackburn on Sale.

¹ Glanv. x. 6-11.

² Aut ita convenit inter creditorem et debitorem quod exitus et redditus interim se acquietent, aut sic quod in nullo se acquietent. Prima conventio iusta est et tenet: secunda iniusta est et inhonesta, quae dicitur mortuum vadium, sed per curiam domini regis non prohibetur fieri, et tamen reputat eam pro specie usurae. — GLANV. x. 8.

³ See Ancient Charters, Part I., ed. J. H. Round (Pipe Roll Soc., 1888), Nos. 56, 61.

⁴ See Heusler, Inst. d. D. P. R. ii. 240-250.

⁵ Canciani, 2. 465, "per istum fustem" in the same formula (from a Veronese MS.) with "spondes ita? sic facio;" Grimm, D. R. A. 123, 129, 130; cp. Du Cange, s. v. Festuca.

next, is established by the fashion which prevailed for some time, and which leaves traces quite late in the Middle Ages, of regarding the debtor's honor as a kind of object put in pledge with the creditor. One is tempted to guess that this may be at the bottom of the Germanic form of "*fidei datio*;" but when we consider it in the light of Roman analogy, the obligation of plighted faith would rather seem to go back to the antiquity of days when such subtleties were unknown, and, in fact to be older than any regular temporal sanctions. We know that the right hand was hallowed to *Fides* from very early times. Although it may seem plausible at first sight to suppose that originally there was not a mere giving of the hand, but a handing over of some material symbol,¹ the mutuality of the hand-grip is against this. It seems more likely that a man proffered his hand in the name of himself and for the purpose of devoting himself to the goddess if he broke faith. Expanded in words, the underlying idea would be of this kind: "As I here deliver myself to you by my right hand, so I deliver myself to the wrath of *Fides* [or of Jupiter acting by the ministry of *Fides*, *dius fidius*] if I break faith in this thing."²

All we learn officially about *fides* in the twelfth century is that people must have some better proof if they will come to the king's court and not go empty away. "*Die autem statuta debitore apparen- te in Curia, creditor ipse si non habeat inde vadium neque plegios neque alium diracionationem nisi solam fidem, nulla est haec probatio in curia domini regis.*"³ Glanvill is careful to add that "*fidei lesio vel transgressio*" is a proper subject of criminal cognizance in the ecclesiastical court; but by statute (*per assisam regni, i. e., the Constitutions of Clarendon*) "*fidei interpositio*" must not be used to oust the king's jurisdiction. To this point we must return; but we may first look for traces of what the practice outside the king's court was. The rule of the Court

¹ Grimm, D. R. A. 605, seems to suggest this.

² For the special connection of *Fides* with Jupiter, see Ennius ap. Cic. Off. 3, 29, 104: "*O Fides alma apta pinnis et iusiurandum Iovis.*" Cp. Leist, *Altarisches Ius Civile*, Jena, 1892, pp. 420 *seqq.* Leist has no doubt (p. 449) that the hand itself was the pledge. Promises by oath were said to have been put by Numa under the protection of all the gods, *ib.*, 429. Cicero's comment, "*qui ius igitur iurandum violat, is fidem violat,*" etc., deriving the force of a formal oath from the natural obligation of *fides* implied in it, is a reversal, perhaps a conscious reversal, of the process of archaic morality. Other passages in Cicero show that the cult of *Fides* was treated as deliberate ethical allegory by educated Romans of his time.

³ Glanv. x. 12.

Christian, whatever its origin, answered to and was reinforced by customary Germanic law. So much we may take from the Salic law, of which the fiftieth chapter¹ is headed "De fides factas."

In English deeds after the Conquest we find quite commonly, down to the time of Edward I., covenants or confirmatory clauses in which the words "affidare," "fide media," occur.² Since we know that *fides* was not available as a method of proof in the king's court, it follows that the practical object of such clauses was to give jurisdiction to the Court Christian, or possibly to other local courts not bound by the strict rules of the king's court. In one royal department, the Exchequer, the solemn faith-plight had an important part. The sheriff gave his faith for the accuracy of his returns as to dues which could not be satisfied, and he was authorized to give time to a tenant in chief of the king who in person, or by his bailiff, pledged his faith to the sheriff to render account on the proper day.³ Undertakings "interposita fide" were not unfrequent from the eleventh to the thirteenth century in transactions among princes and the great men of the kingdom, where one would rather have expected to find an oath.⁴ We have already seen, however, that the canonists, herein following the rationalizing ethics of Cicero,⁵ treated the obligation by faith as little, if at all, inferior to that of an oath. It would seem, indeed, to have implicitly contained the essentials of an oath, and to have differed from an oath only in the absence of a sacred book, or other thing sworn upon (except so far as the right hand itself was in early times deemed sacred for this purpose), and of an express imprecating form of words.⁶ We need at this stage no further authority or illustration to show that the spiritual courts freely claimed and exercised jurisdiction in all sorts of cases where *laesio*

¹ As now commonly cited; p. 65 in ed. Behrend, 1874.

² Madox, *Form. Angl.* 147, 151, 154, 160; sometimes there is an oath with express submission to spiritual jurisdiction, 161; with the very full form, 157 (A. D. 1247); cp. F. W. Maitland's example in *L. Q. R.* vii. 65, of about thirty years later.

³ *Dial. Scacc.* ii. 12, 19, 21, 28.

⁴ Sir E. Fry in *L. Q. R.* v. 238.

⁵ *Ibid.*

⁶ Sohm says, *Eheschl.* 48: "Nur eine Abschwächung des Eides ist nach mittelterlicher Uebung der Handschlag," not meaning, apparently, to assert any deviation of the kind within historical times. The citations in his note rather go to show troth-plight as standing on the same line as oath.

fidei was involved.¹ The king's temporal courts, after living for some centuries in a state of frontier disputes with the Courts Christian, addressed themselves to a serious competition in the fifteenth century, and finally, if the phrase may be excused, drove their rivals out of the trade. For the present it suffices to mark the limits within which the debatable ground was narrowed by the Constitutions of Clarendon, and, a century and a quarter later, by the so-called statute of *Circumspecte agatis*.

One hardly need explain that there was no question of war all along the line between the spiritual and the temporal power. The king never disputed that many questions belonged of right to the justice of the Church, nor the Church that many belonged to the justice of the king. But there was always a greater or less extent of border-land which could be more or less plausibly fought for. In this region the mastery was with the party which could establish the right to draw the boundary line. This was quite as clearly perceived by Henry II. and Becket as by any modern political theorist; and the stress of the controversy was on the point of determining who should have the prerogative voice on the question of jurisdiction in doubtful cases. The Constitutions of Clarendon mark the king's determination that the king's judges, not the bishops, shall be the persons to say what matters are for the king's court and what are not. The fifteenth article, which alone immediately concerns us here, is in these terms: "*Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in iustitia regis.*"

This does not say that spiritual courts shall not entertain any suit founded on *fidei interpositio*, but only that, where there is a debt of which the king's court has cognizance, the addition of *fidei interpositio* shall not transfer the jurisdiction to the spiritual court. It seems to leave the Court Christian a free hand in cases where the secular procedure does not give any remedy at all. This view was beyond question freely acted upon in practice, and it seems to have been approved by the framers of *Circumspecte agatis*. This document may be described as a royal circular to the judges; perhaps it was issued along with some set of commissions, or sent after the judges after they had already started on their circuits. As Coke states it in his curiously unhistorical way, "The Bishop

¹ See Coote, *Practice of Eccl. Courts*, Introd. 93 *seqq.*, and Archd. Hale's *Precedents and Proceedings*, *passim*.

of Norwich is here put but for example; but it extendeth to all the Bishops within his Realm."¹ The bishop's court is not to be interfered with in matters of spiritual discipline, "pro hiis quae mere sunt spiritualia," — namely, mortal sins which are not punishable as crimes by the temporal power; and it is laid down as already settled ("concessum fuit alias") that laying violent hands on a clerk, defamation, and, according to some copies, breach of faith in like manner, are good subjects of ecclesiastical jurisdiction so long as not the payment of money, but spiritual correction, is the object of the suit. The words, "et similiter pro fidei laesione," have always been treated as authentic; and it would be idle for any purpose of legal history to conjecture whether they were an original part of the letter omitted by accident in some copies, or an addition inserted only after a certain number had been written and despatched.

Such records of ecclesiastical practice as exist, and have been made public, show that the Courts Christian were not slow to exercise all the power this ordinance left them, and possibly more.² There is nothing to suggest that their judges and officers troubled themselves to inquire in any case whether there might not be a remedy in the secular court, and it is evident that many of the suits brought in the ecclesiastical courts were in substance not distinguishable from actions of debt or detinue. A protest made by Fortescue and some of his fellow-judges in the year 1459 is on record;³ but, so far as we can learn, it had no great effect at the time.

We may now pass to the secular remedies available for enforcing contracts under the system of the common law as settled in the thirteenth century. The action of debt was more freely used than in Glanvill's time, but it was no more an action on a promise in Edward I.'s reign — nor is it now, for that matter, in those jurisdictions where it still exists — than it was in Henry II.'s. It is a "droitural" proceeding, a writ of right for money or chattels; it claims restitution, not the performance of an undertaking.⁴ The

¹ 2 Inst. 487.

² See select cases noted at end.

³ 38 H. VI. 29, pl. 11. A compromise of an ecclesiastical suit for a sum certain, made in the Court Christian with renunciation of *privilegium fori*, was enforceable in the same court. Bracton's Note Book, pl. 570, A. D. 1231.

⁴ See the form in the "Statutum Walliae," and cp. F. W. Maitland, Appendix A to Pollock on Torts.

defendant has money or goods of the plaintiff's which he ought to return, and the plaintiff claims to have his money or his goods again in the same words in which he would claim to be restored to possession of land. It is "*Praeceptum N. quod juste et sine dilatione reddat R.*," — "*unam hidam terrae*," or "*centum marcas*," as the case may be; and the creditor is said to be "deforced" of his money no less than the claimant of his land. Indeed, this was never forgotten in the modern system of pleading while common-law pleading existed in England; for debt would lie whenever a sum certain was due to the plaintiff, whether by contract in the modern sense or not. Statutory penalties, forfeitures under by-laws, amercements in inferior courts, money adjudged by any court to be due, were recoverable by it.¹ The repayment of an equivalent sum of money is equated, with the bold crudity of archaic legal thought, to the restitution of specific land or goods. Our Germanic ancestors could not conceive credit under any other form. After all, one may doubt whether the majority of fairly well-to-do people, even at this day, realize that what a man calls "my money in the bank" is a mere personal obligation of the banker to him (cp. Langdell, *Contracts*, §§ 99, 100).

Another remedy known in the thirteenth century, which at first sight looks much more capable of being used for the enforcement of contracts in general, is the action of covenant. We must not forget, however, that the writ of covenant is no less "*droitural*" in form than that of debt: —

"Breve de convencionem.

"*Rex vic. salutem. Precipe A. quod juste et sine dilatione teneat B. convencionem inter eos factam de uno meſ. X acris terre*," etc.²

Further, it appears from the Irish Register of 1228, which has been investigated by Mr. F. W. Maitland, that the writ was originally confined to matters "*de aliqua terra vel tenemento ad terminum*;" and in the *Statutum Walliae* this seems to be regarded as the usual and typical, if not the only, scope of the action. There is some evidence that in the course of the thirteenth century attempts were made to establish a kind of qualified tenure in villeinage by express agreement, "*ex conventionem*."³ I know not

¹ Blackst. iii. 160, 161, with an unhistorical attempt at explanation by an "implied original contract" to pay; cp. Langdell, *Summary of Contracts*, § 100. See Note B at end.

² Stat. Wall. 12 Ed. I. c. 6 (A. D. 1284).

³ Bracton, 208 b, 209 a.

whether payments described as "conventional," and not otherwise accounted for, which sometimes occur in old titles, are to be referred to this origin.

At any rate, almost all the recorded cases on covenants of the thirteenth and early fourteenth centuries appear to relate to interests in land,¹ although it is certainly said in the Statutum Walliae, c. 10, "*petuntur aliquando mobilia aliquando immobilia.*" Judgment might be for the recovery of seisin where power of re-entry for breach of covenant was expressly given in a lease, and possibly in other cases. At one time, indeed, it was held that a covenant to assure lands might operate (as we should now say) as a conveyance, even against a subsequent purchaser by feoffment.² This last opinion, however, is clearly overruled by the Statutum Walliae, which specifies the case of the defendant having enfeoffed a stranger as an example of those in which the freehold cannot be recovered, and the judgment must be for damages.

Still, there was no formal reason why the action of covenant should not have become an efficient means of suing on contracts of every kind, if the king's courts had admitted the agreement to be proved otherwise than by writing. For some time the practice was at least unsettled in this respect. In Henry III.'s time we find plaintiffs offering to prove alleged covenants by suit, and defendants offering to disprove them by wager of law, without either party having anything to say about the necessity of a deed.³ In one case, A. D. 1234,⁴ we find a defendant in covenant objecting that the plaintiff brings neither deed nor suit; in fact, no proof at all: "*Nullam sectam producit nisi simplicem vocem suam nec cartam ostendit nec aliud de aliqua convencione;*" the plaintiff of course fails, but evidently it was thought that suit might have been enough. Two generations later, however,⁵ we have two cases in the same eyre showing that suit is accepted by the court in a writ of debt, and that in covenant suit without writing is objected to; the result is not stated, but it would seem from another report of proceedings in

¹ Cp. Reeves, *Hist. Eng. Law*, ii. 336. The case from 20 & 21 Ed. I., cited below, is a not quite certain exception.

² Bracton's Note Book, pl. 36. In 22 Ed. I. 494-6 there seems to be some doubt whether the freehold can be recovered or not. Note the use of the word *atort*, which is not immaterial in connection with the later history of assumpsit, and cp. 30 Ed. I. 142.

³ Bracton's Note Book, pl. 890, 1549.

⁴ Ibid. 1129.

⁵ Y. B. 20 & 21 Ed. I. 222 (A. D. 1292). *Qu.* was this "bill of covenant" by a writ of covenant proper?

the same case¹ that the plaintiff sued afresh in debt. Not long after this time, at all events, the rule finally prevailed that nothing less than a deed would be accepted as proof in the action of covenant; insomuch that *covenant* became, as it still is, the regular term for a promise under seal. How completely specialized and incapable of expansion the writ of covenant was in the settled practice of the common law is shown by the familiar rule that when the promise, though under seal, is to pay a sum certain, debt, not covenant, is the appropriate remedy.² Bracton certainly thought that miscellaneous covenants, even under seal, were not within the ordinary jurisdiction of the king's court: "Iudicialis autem esse poterit stipulatio vel conventionalis [Bracton explains on the same page, following the general tendency of mediæval Roman law, that "stipulatio" may well be made "per scripturam"] . . . conventionalis quæ ex conventionione utriusque partis concipitur . . . et quarum totidem sunt genera quot paene³ rerum contrahendarum, de quibus omnibus omnino curia regis se non intromittit nisi aliquando de gratia."⁴ The fact that Bracton's exposition of contracts in this chapter is copied from the Institutes of Justinian shows of itself that the common law had as yet no theory of contract at all, nor, in the superior courts at any rate, a systematic practice.⁵

There is still the action of Account to be considered. In this action also the writ contained the characteristic "droitural" words *juste et sine dilatione*.⁶ The form was "Precipe A. quod iuste et sine dilatione reddat B. rationabile compotum suum de tempore quo fuit ballivus suus in C. receptorum denariorum ipsius B. ut dicit."⁷ And in the modern theory of the law, "the obligation to render an account is not founded upon contract, but is created by law independently of contract."⁷ It was a means of enforcing certain kinds of contracts and obligations *quasi ex contractu*; but it leaves us as far off from any general doctrine of contract as ever.

The earliest example of this action known to me dates from

¹ Ib. App. II. p. 487.

² Debt was already allowed as an alternative form of action in the thirteenth century. Y. B. 21 & 22 Ed. I. 559, 601.

³ *Poenae* in the printed book; *pene* in several good MSS. The phrase is from I. 3, 18, § 3.

⁴ Bracton, fo. 100 a.

⁵ Güterbock has rightly drawn this inference (Henricus de Bracton, p. 106).

⁶ O. N. B. 57; cp. F. N. B. 117 c.

⁷ Langdell, Survey of Equity Jurisdiction; Harvard Law Review ii. 243.

1232;¹ but much of the later efficacy of the process was due to the statute of Marlbridge (A. D. 1267),² and we do not find the action in common use before the fourteenth century. Throughout the fourteenth and fifteenth centuries it was frequent enough, as the Year Books and Abridgments show. In after times the more powerful and convenient jurisdiction in equity superseded the process of account at common law, though the action lingered on in one application, as a remedy between tenants in common, late enough to furnish one or two modern examples.

In inferior and customary courts of secular justice the rules of proof were doubtless much laxer than in the king's courts, and informal agreements must have been enforced in their various jurisdictions to a considerable extent. Mr. Maitland has called attention to strong evidence of such practice in the rolls of the Bishop of Ely's court at Littleport, belonging to the late thirteenth and early fourteenth century. There we find a number of suits on miscellaneous *conventiones* which are neither stated, nor can easily be supposed, to have been in writing.³ Even in the regular law-books we hear of customs in London and elsewhere to allow covenants to be proved by word of mouth, or, at any rate, to admit proof by tally where the king's court would require a deed. Attempts were made to obtain a footing for these customs in the king's courts, but they seem to have uniformly failed.⁴ We still know very little of the procedure and rules of proof of the courts which administered the law merchant; and what the books describe as special customs may perhaps have been nothing but the application of general or at least English mercantile usage. There is nothing to show that such customs, general or special, had any effective influence on the development of the common law. Formalism prevailed in the superior courts, and in the fifteenth century the strongest and most acute-minded judges who had administered the king's justice since Edward I.'s time found themselves without any adequate means, in the way of either doctrine or practice, of keeping abreast of the needs of business and facing the competition of the ecclesiastical courts.

I have nothing to say, in this REVIEW at any rate, of the bold and subtle devices by which the seemingly insuperable obstacles

¹ Bracton's Note Book, pl. 859.

² 52 Hen. III. c. 23.

³ The Court Baron, Selden Soc., 1891, pp. 114-118.

⁴ F. N. B. 146 a; Liber Albus, 191 a. Other references in Pollock on Contract, 5th ed. 141.

were ultimately circumvented. Mr. Ames has made the history of Assumpsit his own.

Frederick Pollock.

NOTE A. — It would appear that in practice the ecclesiastical courts continued to exercise a wider jurisdiction over affairs of common temporal life, including the fulfilment of promises, than could be justified even by a liberal construction of the statute *Circumspecte agatis*; ¹ and this down to the beginning of the sixteenth century, as Hale's collection of cases makes plain.

In 1482, "Willielmus Parson fregit fidem Willielmo Wheteaker pro convencione feni, 'bargen of hey,' iij s. ij d." ² Parson denies the article, and is dismissed, but is in trouble again for not paying the fees.

"Willielmus Weldon fregit fidem Mag^o Ric^o Bosworthe pro non solucione XXs." ³ He submits.

In 1508, "Robertus Church notatur officio fama referente quod est communis perjurus et presertim violavit fidem cuidam Johanni Tatam in non solvendo eidem Vs. quos promisit sibi fide media ad terminum effluxum pro toga de dicto Johanne empta."

Proceedings are abated by the party's death: "Deus Rex celestis miserere anime sue quia mortuus est ideo dimittitur."

In 1500, "Thomas Hall notatur officio quod est communis violator fidei." ⁴

In one case of 1490, a claim of 14s. 6d. for money lent "nomine mutui" (but it seems really for the price of goods supplied) is made by Thomas Palmer and Alice, his wife, attended by witnesses, who swear to the debtor's acknowledgment. ⁵

Proceedings for a vexatious prosecution for alleged breach of faith. ⁶

Charge for perjury in non-payment of (sum left blank). ⁷ This would be within *Circumspecte agatis*, according to the current reading of the text.

Also there are suits for detaining goods, and undertakings given before the court. ⁷

¹ See twelfth to thirteenth century cases from Plac. Abbrev. ap. Coote, Practice of Eccl. Courts, Introd. p. 95.

² Hale, Precedents and Proceedings, pp. 7-8, No. xxx.

³ p. 8, No. xxxi.; p. 80, No. cclxxii.

⁴ No. ccxxxviiij.

⁶ 28, No. cxiii.

⁵ p. 23, No. xc.

⁷ 57, No. cc.

iiij die Octobris anno Domino mill^o cccc lxxxx Willielmus Wright promisit fide sua media in manu mei Johannis Bellaw quod satisfaceret Ricardo Smyth pistori certa vasa electri, etc.¹

One Matthew Chambir is also brought to promise as surety.

In 1500, "Isabella Wheler notatur officio quod detinet certa bona Alicie Horewode, viz. ij ollas ejus"² (no mention of *fides*).

(The editor seems to think this is a case of not restoring a pledge. Cf. Nos. 49 and 114; but there is nothing to show it.)

NOTE B.—I have purposely not attempted to discuss the element of personal relation between the parties involved in the action of Debt, beyond showing that it was not the obligation of a promise as we nowadays conceive it. Perhaps the notion of Privy in archaic procedure may be simpler than it looks. A man can be put out of possession either with or against his will. If against his will, it is a question of a public offence,—of theft, in fact. Where A finds B, a mere stranger, holding A's cattle, or what not, he challenges the goods as stolen, and puts B to vouch his warrantor. But where A has willingly parted with something that he is to get back in due time (which includes, in the early legal mind, foregoing immediate payment of the price of goods sold, or the like), then a different procedure is required. B has acknowledged A's title, and has to show that he has satisfied the conditions. This distinction does not apply (in and after the Anglo-Norman period at least) to actions to recover land, where it would seem that the notoriety of seisin of immovables takes the place of privy. Land cannot be carried, or driven away, or hidden.

The notion of a "Vindication" in the Roman sense, *i. e.*, a claim to a specific thing founded on the plaintiff's purely civil right of ownership in an abstract form ("hunc hominem meum esse aio ex iure Quiritium"), and independent of any relation, rightful or wrongful, between the parties, was, I conceive, absolutely foreign to our Germanic ancestors. They would have refused to see any ground of jurisdiction.

¹ 20, No. lxxxvi.

² 71, No. ccxlii.

FEDERAL PROTECTION AGAINST STATE POWER.

N EARLY sixty years ago Chief Justice Marshall, speaking for the Supreme Court of the United States,¹ formulated a canon of construction for the amendments to the Federal Constitution, based upon a consideration of the circumstances under which they were adopted and the nature of the Constitution itself: leading to the result that the first eight, containing general guarantees of civil and religious liberty and of protection to person and property, are limitations only upon the federal power, and cannot be invoked as against an exercise of power by the States.

The arguments for this construction are principally these: The Constitution provides for the federal government, state governments being already in existence at the time of its adoption; and limitations are to be deemed applicable, therefore, to power conferred by the Constitution, except as they are expressly made applicable to the States. For instance, in Sec. 9 of Art. 1 is the general provision that no bill of attainder or *ex post facto* law shall be passed, while in the next section States are expressly prohibited from passing such laws; it being evidently assumed that the general prohibition would apply to Congress only. The historical fact that objection was made in the state conventions called to act upon the Federal Constitution because the instrument did not contain a general bill of rights as a protection to the people against the government provided for by it, and that in consequence of such suggestions by the States, Congress at its first session proposed these amendments among others, indicates most conclusively that they were intended as a limitation on federal power, and not on state power.

The conclusion reached by Chief Justice Marshall has been accepted in a long line of decisions by the Supreme Court, reaching to the present time, and has been acquiesced in as final and conclusive by all writers on constitutional law.²

¹ *Barron v. City of Baltimore*, 7 Peters, 243.

² Story on the Constitution, secs. 301-305, and 1857-1868; Cooley, Const. Lim. (6th ed.), 29; Hare, Am. Const. Law, ch. 24.

The case of *Barron v. City of Baltimore*, already referred to, was one in which the provision of the sixth amendment prohibiting the taking of private property for a public use without just compensation was invoked as against a state statute, and was held not applicable. The same doctrine has been announced with reference to provisions as to jury trial in suits at common law,¹ as to criminal prosecutions in general,² as to previous jeopardy,³ as to cruel and unusual punishments,⁴ as to issuing warrants only on probable cause supported by oath,⁵ as to the right to peaceably assemble,⁶ and as to the right to bear arms.⁷

Notwithstanding the cogency of this reasoning and the conclusiveness of these authorities, constant efforts have been made to break down the doctrine, and these efforts have finally received encouragement from members of the court. In the case involving the right to bear arms,⁸ and again in the *Anarchists' case*,⁹ counsel very strongly insisted that the rights, privileges, and immunities protected by the first eight amendments against federal interference constitute the privileges and immunities of citizens of the United States which the States are, by the fourteenth amendment, forbidden to abridge. In the *Presser case* it was distinctly announced by the Supreme Court that the right to bear arms, mentioned in the first amendment, is not an attribute of national citizenship, likening the case to that of *United States v. Cruikshank*,¹⁰ where it was held that the right to peaceably assemble was guaranteed as against state action only so far as it was involved in the exercise of the right to petition the federal government. In the *Anarchists' case*¹¹ the court, after reaffirming the doctrine that the eight amendments are only limitations on federal power, recognizes the point urged under the fourteenth amendment, but, after an elaborate consideration of the statutes of Illinois and the evidence presented by the record, comes to the conclusion that there was nothing in the case to raise the question as to whether that amendment preserves to the citizen as against his State the privileges and immunities enumerated in the eight amendments. The question so elaborately and forcibly

¹ *Walker v. Sauvinet*, 92 U. S. 90.

⁸ *Fox v. Ohio*, 5 How. 410.

² *Twitchell v. Commonwealth*, 7 Wall. 321.

⁴ *Pervear v. Commonwealth*, 5 Wall. 475; *In re Kemmler*, 136 U. S. 436.

⁵ *Smith v. Maryland*, 18 How. 71.

⁶ *United States v. Cruikshank*, 92 U. S. 542.

⁷ *Presser v. Illinois*, 116 U. S. 252.

⁸ *Presser v. Illinois*, 116 U. S. 252.

¹⁰ 92 U. S. 542.

⁹ *Spies v. Illinois*, 123 U. S. 131.

¹¹ *Spies v. Illinois*, 123 U. S. 131.

argued, to the effect that these privileges and immunities are by the fourteenth amendment protected against state action, was therefore not passed upon by the court.

In the *Kemmler* case,¹ the question being whether the statute of New York providing for execution by electricity was unconstitutional, as in violation of the eighth amendment to the Federal Constitution, forbidding cruel and unusual punishments, or the "privileges and immunities" or "due process of law" clauses of the fourteenth amendment, the court, without division, or, apparently, serious difficulty, held that the eighth amendment was not applicable to the States, and that protection to life, liberty, and property still rests primarily with them, and that the "privileges and immunities" guaranteed are those arising out of the nature and essential character of the national government. But it is evident that the court felt that the punishment of death by electricity was not a "cruel and unusual" punishment in cases where capital punishment is proper.

In view of the fact that the question as to whether the privileges and immunities guaranteed in the eight amendments as against federal infringement constitute privileges and immunities which the States are by the fourteenth amendment forbidden to abridge has thus not seemed to have attracted the attention of the court in previous cases as being vital, it is perhaps not surprising that in a recent case it should have occasioned a most serious division. In *O'Neil v. Vermont*,² decided in April, 1892, the question was whether a conviction in Vermont for violation of the laws of that State with reference to the sale of intoxicating liquors by shipping the same into the State by express to fill orders for private consumers, and a sentence (in accordance with special provisions of the State law) for repeated violations charged in one count, which would involve payment of fines to the amount of over six thousand dollars, or, on default, confinement at hard labor for over fifty-four years, infringed any provisions of the Federal Constitution. In the opinion of a majority of the court no federal question appeared on the record; but three judges were of the opinion that it sufficiently appeared that the defendant in the state court claimed the protection of the commerce clause, and also of the provision against cruel and unusual punishments; and these three judges held that not only as to the commerce clause, but also as to the clause relating to pun-

¹ 136 U. S. 436.

² 144 U. S. 323; 12 Sup. Ct. Rep. 693.

ishments, the decision of the state court denied and abridged the privileges and immunities of defendant under the Federal Constitution, and was in violation of the law of the land.

Here, then, with three judges insisting that the fourteenth amendment extends the protection of the Federal Constitution, as against state action, to the privileges and immunities which by the first eight amendments were originally secured by that charter only as against federal abridgment and the other six judges expressing no opinion on that question, but only claiming that the case did not call for any expression of view in reference thereto, there is a controversy of far-reaching importance. As indicating what solution of that question is likely to be reached when it does come squarely before the court, it is important to notice, first, decisions of the court on analogous questions; secondly, considerations of expediency bearing upon the probable intention with which the constitutional provisions in question were adopted.

The adoption by the Supreme Court of the doctrine contended for by counsel in the Spies and Presser cases, and accepted by the dissenting judges in the O'Neil case, would overrule two classes of decisions in that court: First, those in which the established doctrine of the court with reference to the effect of the eight amendments prior to the adoption of the fourteenth amendment has been recognized as applicable since the adoption of that amendment.¹ These cases are few, and in some of them the objection now made under the fourteenth amendment was not considered; but they are important in defining the relations between the federal government and the States, and to overrule them would seriously interfere with state legislation. For instance, in a number of the States the grand jury system is modified or abolished; and this has been held to be entirely within state control.² The power of States to regulate the right of jury trial in state courts, and to abolish it if found expedient to do so, is generally assumed, and is recognized.³ But under the doctrine adopted by the dissenting judges in the O'Neil case, no person could in a state court be put on trial for a capital or

¹ The Justices *v. Murray*, 9 Wall. 274; United States *v. Cruikshank*, 92 U. S. 542, 552; Kelly *v. Pittsburg*, 104 U. S. 78, Spies *v. Illinois*, 123 U. S. 131, 166; Presser *v. Illinois*, 116 U. S. 252, 265.

² Hurtado *v. California*, 110 U. S. 516 (Harlan, J., *dissenting*, Field, J., *not taking part*).

³ Edwards *v. Elliott*, 21 Wall. 532, 557; Walker *v. Sauvinet*, 92 U. S. 90 (Field and Clifford, JJ., *dissenting*); Pearson *v. Yewdall*, 95 U. S. 294.

otherwise infamous offence except upon indictment concurred in by twelve grand jurors; and in suits at common law where the value in controversy exceeds twenty dollars the right to trial by jury of twelve, rendering no verdict unless unanimous, must not be impaired. Second, the doctrine in question would overrule those cases which relate to the nature of the fourteenth amendment and explain its origin and purpose, holding that it was not intended thereby to extend federal protection to the citizens of the States in the enjoyment of rights which pertain to them as citizens of a free government.¹

Considerations of expediency which must have been in the minds of the framers of the Federal Constitution when it was adopted, and which retain their force, notwithstanding the fourteenth amendment and the enlarged scope of the federal government which it signifies, can be stated in a few words. States which differ as essentially in the origin, customs, and local needs of their people as do Massachusetts, Virginia, Louisiana, and California, ought not to be required to conform themselves to the same forms of legal procedure, nor to the same rate and direction of legal development; nor should legal development be hampered by the necessity of securing federal action for each progressive step. It ought to be possible to take the initiative in law reform in any State where circumstances make it practicable, allowing the success or failure of the experiment to exercise an influence in determining whether such experiment shall be tried in other States. Elasticity, within the limits imposed by the necessity of federal union and the maintenance of a republican form of government, is more desirable than uniformity, and opportunity for growth is to be prized far above a technical conformity to a legal system which, however justly prized at one time in the country of its origin, was framed under institutions distinctly different from ours, and which the people among whom it originated have shown their willingness to change radically, in order to adapt it to their own development.

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¹ *Slaughter-House Cases*, 16 Wall. 36, 73; *United States v. Cruikshank*, 92 U. S. 542; *Davidson v. New Orleans*, 96 U. S. 97; *Presser v. Illinois*, 116 U. S. 252, 256; *In re Kemmler*, 136 U. S. 436.

LAND TRANSFER.—A DIFFERENT POINT OF VIEW.

In dirty upper casements here and there hazy little patches of candle-light reveal where some wise draughtsman and conveyancer yet toils for the entanglement of real estate in meshes of sheepskin, in the average ratio of about a dozen sheep to an acre of land. Over which bee-like industry these benefactors of their species linger yet, though office hours be past, that they may give for every day some good account at last. — *Bleak House*.

IN entering upon a discussion of the Torrens System, so called I am conscious that I am at a great disadvantage. I have not been able to give the subject the time and thought which I would gladly have given. I am also sensible of a bias in favor of the old order of things in which I have grown up, which might well disqualify me. But I have been asked what I think of the proposed change, and I feel under a certain compulsion to answer. What I am disposed to think of it at the present moment is that, if adopted, a real gain, but not nearly so large as anticipated, will be made for real-estate owners of the future, at the cost of much intervening trouble and expense, with many drawbacks, including a great establishment permanently saddled on the public treasury, and a rigid system of officialism and red tape in absolute control of private transactions in land.

Whether the change would be worth while on the whole, I am not sure; I incline to think certain features of it should be adopted, at least experimentally.

The proposed system, as I understand it, involves two entirely separable principles. One is that of inexpugnability of title, the State not merely as insurer promising indemnity against failure of title, but giving at each transfer a title which cannot fail, because it is made part of the framework of society that it shall not. The other is that of improvement in conveyancing and registration.

Let us take the matter of governmental title first. It is hardly necessary to say that the idea is very attractive. Some of us have held under the present order of things warranty deeds from the Commonwealth; but there the title might fail, and we might be obliged to sue for compensation, — humbly to the Legislature, or not

humbly in the courts, if the law then in force should allow the State to be sued.

But the promise here is of a title absolute, — until the State, which gave it, takes it away, as it may prove very ready to do when it has got its hand in, and the people are thoroughly educated in the doctrine that the State in the great perpetual fountain of title from which each draws his draft, till he gives his place to another, who draws in turn.

Such a system would require, I suppose, a constitutional amendment; and whether real-estate owners care to enter upon the path of constitutional changes as to land, I do not know: it might have dangers.

Perhaps I have misunderstood the idea, and the real intent may be to get title into the Commonwealth, and then have it convey with warranty. This might be accomplished by allowing the individual landholder to transfer his title to the State, providing for the quieting of that title against all the world by some process of notice and judicial or quasi-judicial sifting, or by the exercise of an enlarged power of eminent domain, taking an entire territory and then granting it out. Perhaps either of these methods might be worked under the existing constitution. I do not feel sure that the present power of eminent domain may not extend to this. If Tom-all-alones involved in the meshes of *Jaundyce v. Jaundyce* can be taken as a nuisance after it has fallen into decay, why not when the titles there are in a condition such as must eventually make it a nuisance? If the taking is really for the good of society, is not this enough? It is clear that the title of one cannot be taken to give to another to end litigation (Lewis on Eminent Domain, sec. 205). Whether the supposed case could be distinguished and upheld, query? But even if all titles could be got into the State without a constitutional amendment, it would still seem impossible to get along without one, as it would be impracticable to have a quasi suit or taking with each future transfer.

But perhaps again I have misunderstood what is proposed, and it is merely governmental insurance of title, *i. e.*, of indemnity for failure of title, which is proposed. I see no constitutional difficulty in legislation which should authorize the insurance by the government of all titles which might come up to an official standard; it is merely substituting public for private insurance. But the advantages of such a plan over private insurance would not be, it seems to me, sufficient to justify it, and there would be

no balm in such a Gilead for clouded titles which fall below such standard.

But whatever system of securing the title is adopted, the having individual titles here and there brought under the Act after what amounts to a lawsuit in each case, and the maintenance side by side of the old system and the new, would, it seems to me, be a very bad arrangement. No title which had a blemish could be brought under the Act. Every title not brought under the Act would be under a species of cloud. Persons who supposed they had a good title would try to come under the Act, and would rouse some sleeping dog and fail.

If we are to change to a system of governmental title, let it be one which brings under the Act an entire city or district or block, upon the initiative of its owners, or some proportion of them.

But do we need governmental title in any form? If we are to judge of the proposed remedy, we must know the disease.

The uncertainty of titles to-day is the disease. How bad is it? Muster all the bugbears, — forgery and fraud, conveyancers' mistakes, intrinsic complications from doubtful law or facts, as a complicated will, or a child never heard from, — how many titles are unmarketable? How much loss has there been from bad titles? How much litigation is there over titles? No answer can be given to these questions which will not affirm the essential soundness and practical safety of the present system.

If the disease is so mild, may we not conclude that any very expensive remedy is not expedient?

It would obviate much of the difficulty in bringing titles under the Act, if all present titles should be registered as possessory, and the Act be made to apply to all future transfers. But if the certificate must be conclusive as to changes in the title from the passage of the Act to date of the certificate, a constitutional amendment would still seem necessary.

As I have said, the feature of conclusiveness of title is separable and may be dropped, leaving us with a new system of indexing and registration merely; but the subject has not been presented from that point of view, and I shall not attempt to consider it in that aspect.

Proceeding, then, to a further consideration of the subject on the supposition that the certificate is to have some degree of conclusiveness, I ask again, What is the disease to be remedied? Uncertainty, delay, unwieldiness and perishability of records, expense, — these, perhaps, are the chief categories.

As to uncertainty, of course just so far as it exists it is an evil. The remedies against forgery and personation proposed in the new methods seem to me to adapt themselves as readily to the present methods as to the new. If we are willing to go to the trouble of only executing our deeds before some few magistrates and with a cloud of witnesses, and then leaving those deeds permanently on file I do not see but that we have done about all that is proposed in that direction. The surrender of the old certificate would, I admit, be an additional safeguard; but a copy of the title-deed, which should be certified as given for the purpose of identification, and which must be returned or exhibited with each transaction would seem fully equivalent.

A workable machinery for quieting titles such as will eventuate in a decree binding all the world (as is now possible, since the recent decisions of the Supreme Court, *Arndt v. Griggs*, 134 U. S. 316) would go far to give the desired certainty to title, and an effort is now being made to obtain it from the present Legislature.

As regards delay, paradoxical as it may seem, I believe that in many cases the present system is quicker than the new would be. In many cases no examination of title is desired. Here the deed can be drawn, delivered, and recorded in an hour; you are free to pass title where you please, and the deed is merely carried to the registry and recorded. Under the proposed system, if I understand it, you must draw your deeds, or some sort of writing evidencing the transaction; then you must carry such writing and your duplicate of the certificate or abstract to the register; you must wait your turn, cap in hand; you must have that certificate thoroughly overhauled, whether the purchaser desires it or not; inquiries must be made as to all matters not necessarily apparent on the certificate, which I suppose must include taxes, public assessments, insolvency, encroachments (involving a fresh survey), marriage, and all other facts *in pais*. It seems to me clear that you would not, in such a case, handle your money as quickly in the new order of things as in the old. There are many cases also in which, although an examination is required, the transaction can be accomplished almost as quickly as though no examination were demanded. In the ordinary course things are not so rushed through; there is other business ahead, and it takes time at best to get people together and arrange details. But let the necessity appear, — your client is going abroad, we will say, next day, — and it can be done. Under the new system, I don't see how it can be done.

But the ten days' to three weeks' delay incident to the ordinary full examination would be shortened, I do not doubt, and I do not desire to minimize that gain; and a survey, with all its delay, would be a very decided gain also, though it can always be had now if desired.

As to unwieldiness of records, I am not so much impressed by the rapidly growing mass of the volumes in our registries as I am by the marvel that the life history of each parcel of land in our city, from its origin, can be found in those few volumes.

But I do not see how the mass of records is to be lessened by the proposed change. One suburban farm, cut up into lots, would fill a volume, and the original papers are all to be preserved. Possibly an owner would not be allowed, however, a page a lot, till he actually sells.

As to perishability, it is of course some safeguard to have a duplicate certificate in the owner's hands; but my favorite scheme is to have the records heliotyped in small volumes (say 12mo.), and put away in duplicate in several safe places of deposit.

As regards expense, there would, I believe, be a large saving to the landowner, with a large permanent tax upon the public. The expense to-day, however, is not so burdensome as it sometimes seems. A large percentage of titles are not examined, and a still larger are examined for only a short period, and the land-speculator is almost the only person who has frequent occasion for the services of a conveyancer. One hardship now exists, and I shall rejoice to see it done away with, — the borrower having to pay for successive examinations every time he shifts his loan.

Our present law of limitations by its care for disability necessitates examinations going very far back, where the fullest security is desired. Its "twenty years," in extreme cases, may mean one hundred and twenty. I believe this is all wrong, and that there should be a short Statute of Limitations, without any exceptions for disability. Such a statute would tend greatly to shorten examinations and save expense.

I have always dreaded a shortening up of forms as involving ambiguities and a perplexing mixture of standard forms and special matter, but I have finally come to believe that such a change can be made, and is desirable.

I wish the whole subject of real estate law could be referred to a commission, with the honored author of "Notes on Common Forms" at its head.

Weak or questionable points in the system proposed seem to me to be -

1. The multiplication of instruments and of records. Each incumbrancer, down to the seven years' lessee, must have his page of the registry and his certificate; you have the deed as now, and also the entry. The entry is to be conclusive. Suppose the entry and the deed differ, and the entry is not as it should have been: Is it not as though now we were obliged by law to rely on the margin of the record as to whether a mortgage is discharged or not; and would that be safe? Would it be safe in all counties?

2. Caveats would seem to give unlimited opportunity for blackmail.

3. Suppose a man owns two hundred lots, — which is a moderate computation for a land-speculator, — an attachment is to be entered on every page of his two hundred pages, and so with every other like lien or general conveyance, as a marriage settlement or assignment for benefit of creditors; and this would necessitate keeping an index of names as well as lots.

4. As regards prescription, if the certificate is to be conclusive, of course it overrides this as well as everything else. But why should not prescription have its full effect in determining to whom a certificate should be issued, and give a claim against the State if it should be overlooked? The ripening of long possession into title plays such an important part in our law that, to give it up for a mere convenience of administration, seems of doubtful expediency.

5. As to trusts and equitable rights, are they also to be overridden by the new certificate? If not, what security has the certificate-holder? If the certificate does give a title free from trust, where is the security of the *cestui que trust*, or of the holder of an equitable easement? The record, it appears, is to show nothing of such matters. Is the State to be liable for wiping out such rights, when its officials have no means of determining what they are, or whether there are any?

6. As to devolution of title on decease, that is a distinct branch of law reform. I am inclined to think that considerable simplification can be accomplished in cases of intestacy; but are you going to simplify a complicated will?

7. What happens if a certificate is lost?

8. Is the public to have access to records?

9. On the record pages of what lots is a possible park betterment to be entered? All, I suppose, in the possible district; and so of a board of survey ukase.

10. On what pages in Suffolk, and when, is the issue of a warrant to a messenger in insolvency in Berkshire to be entered, or a bankruptcy in New York after we get a new bankrupt law?

11. How is a way of necessity ascertained and entered?

12. What happens when trustees are removed and new ones appointed by court? Or suppose receivers are appointed, is title not to vest? Suppose the old trustees have carried the certificate out of the State? Cannot the title be passed until they are forced to give it up?

13. What happens when land stands in name of A B "Trustee," or of A B "Trustee for C D," without more?

14. Suppose a foreclosure which is disputed, and the owner of equity and the purchaser at foreclosure sale each wants to sell?

15. Trustees of a land company dedicate a way, or release restrictions, thus giving rights to, we will say, one hundred persons, to whom lots have been previously sold: must all the hundred certificates be brought in?

16. A B makes a release under statute of uses to C D to the use of the parties legally claiming title under E F. What certificates are to be brought in? Would it not be impossible to make such a conveyance?

17. Suppose ten tenants in common, — shall each have a certificate and a page? Suppose a partition sale, and a recalcitrant part owner who has a certificate he will not give up?

The whim of King Log the conveyancer is no longer potent; but have we not a King Stork?

I have no doubt that the block system of indexing would be an improvement. I am inclined to believe that the carrying of the principle still farther to the lot system of the Torrens method would be even better in a city like Boston; but I cannot think it applicable to a country district. I admit that much of my doubt springs from ignorance, and I shall try to hold my mind open, like John Robinson in Holland, for more light.

In the mean time, without having any strong belief in the promised Utopia, I can yet sympathize with the desire for improvement, and take pride that my branch of the profession has men to discover and to champion methods of reform in advance of compulsory pressure from without.

F. V. Balch.

THE "PAROL EVIDENCE" RULE.

II.

IN endeavoring to make some further contributions towards a better understanding of the "Parol Evidence" rule, what is there to say of the relation of that rule to the construction of writings?

"The construction or interpretation of written contracts," says Leake,¹ "consists in ascertaining the meaning of the parties as expressed in the terms of the writing, according to the rules of grammar, and subject to the rules of law." In this statement two or three things should be noticed, *viz.*, that no distinction is made between construction and interpretation;² that the process is said to be that of ascertaining the meaning of the parties, but their meaning so far only as it is expressed in the writing; and that the controlling authority is recognized of rules of language and rules of law. As regards these controlling rules and principles it has been well said: "All latitude of construction must submit to this restriction; namely, *that the words may bear the sense* which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them."³ Obviously, this is no rule of evidence; nor does it change the real nature of the objection when courts express it by saying that "evidence is not admissible" to prove what is thus objected to.⁴ There is a multitude of minor rules and canons of language and legal construction, as when it is said that "children" means legitimate children, unless the contrary is clearly made out, or that "children" *prima facie* does not include "grandchildren;" and he who has to prove a case which is governed by them must conform his proof to their requirements; but they are not, therefore, rules of evidence.

¹ Dig. Cont. 217.

² Neither the common usage nor practical convenience supports a distinction, taken by Dr. Lieber in his "Legal and Political Hermeneutics" (c. 1, § 8; c. 3, § 2), between interpretation and construction.

³ Eyre, C. B., in *Gibson v. Minet*, 1 H. Bl. p. 615 (1791); cited and applied in *United States v. U. P. R. R. Co.*, 98 U. S. 86.

⁴ *Black v. Batchelder*, 120 Mass. 171.

One rule of evidence, properly so-called, and only one, appears to belong to the large mass of matter included under the "parol evidence" rule, *viz.*, that you cannot, in construing a written contract, deed, will, or other like writing, use the direct extrinsic expressions of the writer's meaning evidentially; that is to say, as furnishing a basis of inference in finding out the meaning expressed by the writing. Other extrinsic facts, and even other statements of the writer, may be used evidentially in aid of construction. This sort of thing cannot. In the law of evidence there is no other special rule of exclusion than this. That you cannot use these extrinsic expressions in order to add to the writing, or enlarge or vary it, is a precept of the substantive law.

Let us trace this matter a little in the case of wills. In so far as it was true, before and after the Statute of Wills, in 1540,¹ that writing was not legally necessary to a will, no doctrine that a written expression excluded from consideration an oral one had any necessary application. Doubtless, wills were very often in writing when it was not legally necessary; and then there was a certain scope for such a doctrine.² The Statute of Wills, in allowing, generally, a devise of lands, required writing, but it did not require signature.³ The Statute of Frauds (§ 5), in 1676, in the case of wills of real estate, added the requirements of signature and attesting witnesses, but as to personalty (§§ 19-23) it required no more than writing. It was not until the "Wills Act," in 1837 (Stat. Vict. c. 26, § 9), that the same formalities were necessary, in England, for all wills.

1. In 1568,⁴ where a man had devised land to his nephew, and the nephew died, leaving a son, and the testator thereafter orally told the son that he should have all which the will had given his father,

¹ Stat. 32 H. VIII. c. 1; and compare Stat. 34 and 35 H. VIII. c. 5 (1542-1543).

² As regards the earlier usages in the matter of putting wills in writing, see 1 Swinb. Testaments, 11, 5; 2 Black Book Adm. 71; Y. B. 20 and 21 Edw. I. 264; 1 Calendar of Wills, London Court of Husting, Introduction, pp. xlv, xlv, and *passim*. And see Y. B. 19 H. VI. 69b, 15, *per* Markham, Serjeant (1441).

³ Keilwey, 209, pl. 9 (1557-1558), where one Atkins, being called to prepare a last will for Henry Browne, took full notes, carried them home, and wrote out the will, finishing it before twelve o'clock at noon. On carrying this to Browne's house to read and deliver it to him, within half an hour after twelve, he found that the testator had died at twelve. "The clear opinion of all the justices was that this was a good will in writing, made according to the statute of the year 32 H. VIII." In like manner, to-day, undoubtedly, there exists a contract in writing, if the parties so arrange, without signature (Blackburn, Sale, 1st ed., 43, 44)

⁴ Brett v. Rigdon, Plowd. 340.

it was held that the son took nothing. "All," said the court, "that can make the devise effectual ought to be in writing. . . . No will is within the statute but that which is in writing, which is as much as to say that all which is effectual and to the purpose must be in writing, without seeking aid of words not written." In 1587,¹ where one had left land to the heirs of the body of his eldest son, and if he die without issue, to his two daughters in fee, — on the death of the testator, the eldest son was living, and also a son of his, who was tenant in the action. The defendant's witnesses swore to declarations of the testator that the daughters were to have nothing so long as the eldest son had issue of his body; "but the court utterly rejected the matter."

In a famous case, in 1591,² there was a question upon a devise by Sir Thomas Cheyney, made in 1558-9, to his son Henry and the heirs of his body, remainder to Thomas Cheyney of Woodley and the heirs male of his body, on condition "that *he or they, or any of them*, shall not alien, discontinue," etc. There was a question in the Court of Wards whether this condition extended to the son of the devisor, or only applied to Sir Thomas Cheyney of Woodley and the heirs male of his body.³ As against those claiming under Henry, the question was whether the opposing party "should be received to prove by witnesses that it was the intent and meaning of the devisor to include his son and heir within these words of the condition (*he or they*), . . . but Wray and Anderson, Chief Justices, on conference had with other justices, resolved that he should not be received to such averment out of the will, for the will concerning lands, etc., ought to be in writing, and the construction of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give, but it should be controlled by collateral averments out of the will."

The reader will observe the reasons here given, *viz.*, as wills of land must be in writing, so *the construction of them must be collected from the written words*, and not by any averment out of it;

¹ Challoner v. Bowyer, 2 Leon. 70.

² The Lord Cheyney's Case, 5 Co. 68.

³ In the statement of this case in Moore, 727, the report is more detailed, and apparently more accurate, and it helps one to understand the situation; but the decision is not given. Coke's report, for the purposes which he has in hand, appears to be substantially accurate.

i. e., by setting up any extrinsic matter, — since people should be able to understand and give advice upon wills from the written words. This is not, as in the earlier cases, conceived of as putting forward extrinsic matter which is contrary to the words of the will, or which adds to them, but as offering it in aid of construction, — in a case where a will, admitting of either application, yet does not fix upon either.

But there was more in this report. It became necessary to consider and discriminate an exceptional case. For centuries there had arisen certain familiar questions of ambiguity. In matters of record, in specialties, and in other writings, there had often been occasion to deal with the problem of a name or description equally fitting two or more persons, places, or things. The wrong man having the right name was often in trouble. He had been arrested and brought into court on an *exigent* in out-lawry; or, in the case of a fine or a common recovery, he had had his land claimed by another; or he was sued on a bond given to another who had the plaintiff's name; or perhaps he himself claimed land intended to be devised to another. These situations and the like are familiar all through the Year Books.¹

The established doctrine in such cases was that he should be held, or should recover, who was the one intended. Clearly, the instrument intended only one. Either one was adequately described if taken alone, but neither was discriminated; an infirmity in the written expression left it uncertain which was meant. This was a strait from which there was no outlet, unless you looked beyond the paper, and gave effect to extrinsic matter in aid of construction. So far, therefore, as men dreamed of interpreting records or any other writings without using extrinsic matter as a lamp to read them by, here was a situation that forever tended to undeceive them.²

¹ Walter Brunne's Case, Pl. Ab. 280, col. 1 (1287); Fitz. Ab. *Feff.* 56; s. c. 47 Ed. III. 16, 29 (1373); Y. B. 11 H. VI. 13 (1432); Coteler v. Hall, 5 Ed. IV. (Long Quint) 40 b (1465); s. c. Ib. 48 b, 54 b, 74 b, 80 b, 90, 97 b, and Y. B. 5 Ed. IV. 6, 6; Y. B. 11 H. VII. 6, 4 (1496).

² It is not to be overlooked that there were other provocations in the same direction. It was clearly recognized in slander, whether written or oral, that the meaning of words may depend upon the circumstances under which they are uttered. In 1577 (The Lord Cromwell's Case, 4 Co. Rep. 11 b, "the first cause which the author of this book, who was of counsel with the defendant, moved in the King's Bench"), the court is reported as saying that "in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking

Coke, in his report of the Lord Cheyney's Case, after what is stated above, goes on to deal with this old, familiar case: "But if a man has two sons, both baptized by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead; or that he at the time of the will made, named his son John the younger, and the writer left out the addition of the younger; for in 47 E. 3, 16 *b*," etc., and then he cites a well-known case of two William Peynels, in 1373,¹

of them. . . . The defendant's counsel have done well to show the special matters by which the sense of this word (sedition) appears upon the coherence of all the words." And Coke goes on to tell his reader to note "an excellent point of learning in actions for slander, to observe the occasion and cause of speaking of them, and how it may be pleaded in the defendant's excuse," and to beware of a hasty demurrer in such cases.

In contracts, also, it was always recognized that familiar words may have different meanings in different places, so that "every bargain as to such a thing shall have relation to the custom of the country where it is made" (Keilwey, 87, 3, in the Ex. Ch. in 1505). In *Baker v. Paine*, 1 Ves., p. 459 (1750), Lord Hardwicke, in a mercantile case of sale, remarked: "All contracts of this kind depend on the usage of trade. . . . On mercantile contracts relating to insurances, etc., courts of law examine and hear witnesses of what is the usage and understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction." The development of the mercantile law by the use of special juries involved a recognition of these same ideas.

¹ In the Year Book from which Coke cites it, this case is reported substantially as follows: "William, son of Robert Peynel, brings a *Scire Facias* out of a fine levied between this Robert and others by which . . . [a manor was granted and rendered] to this same Robert, and William; and the younger son sues the issue of the eldest son *Fulthorp* [for the defendant] told how the remainder was tailed to his father . . . and Robert died, and his father entered and died seised, and he is now in as heir. *Hasty* [for the plaintiff] said that the fine was levied to the intent to give the inheritance to him, and therefore the part of the fine was delivered to him by his father Robert at the time of his death,—making protestation that he did not acknowledge that there was any such William, oldest son of Robert, or that he survived his father or was seised, for he died in Robert's lifetime. FYNCHEDEN [C. J.], This is only evidence: it cannot make an issue in law or fact, whether the fine was levied to the intent of giving the inheritance to one or the other. *Hasty* then said that the fine was levied to give the inheritance to him,—making protestation as before. *Persey* [for the defendant], The fine was levied to give the inheritance to our father."

Brooke, in giving this case (*Abr. Fines*, 28, and *Nosme*, 63), notwithstanding what is said in the report, adds to his memorandum of it: "And so see an issue on the intent; and see 12 H. VII. 6, that where a man has manors of Upper S. and lower S., and levies a fine of the manor of S., it shall be taken as that manor of the two about which they conferred and had conversation, and which the conusor intended to pass.

and discriminates such cases on the ground that they involve no "secret, invisible averment." "He who sees the will . . . ought at his peril to inquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent." If the intent be not ascertainable, the will, we are then told, is void for uncertainty, since the law makes no construction in favor of either, giving it to him whom the father intended, "and for want of proof of such intent the will . . . is void."

2. It was probably a little later than this¹ when Bacon wrote his Maxim 25 (sometimes 23), to the effect that where an ambiguity in a writing is made apparent only by what is extrinsic to the writing, you may correct it by extrinsic matter. This maxim,

. . . The intent shall be taken; that is, the manor shall pass which the conusor intended should pass."

Fitzherbert's account of the case seems to be taken from another report. W. here figures as the son of R. H. "*Ham*. [*semble*, Hannemere]. He shall not have execution, for R. H. had a son older than you, named W., who was our father, and there was a talk between J. and R. H. that W. the oldest son should marry J.'s daughter, and the remainder be tailed to our father, the oldest, according to the purport of the fine; and thereupon the fine was levied, and then R. died, and our father entered, and died seised, and we entered as heir. *Hasty* [for the plaintiff]. The fine was levied to the intent that we should inherit, and thereupon R. H. at the time of his death delivered us a part of the fine. FYNCHEDEN [C. J.]. You shall not take issue on the intent, for the intent does not lie in averment. But if I lease land for life, remainder to one W. T. by fine, and there are two W. T.'s in the country, I say that he who first happens upon the remainder shall not keep it against the other, if he cannot prove that the remainder was tailed to him by his name, and that he was the same person. *Belknap*. We understand that if the remainder be tailed to W. T., and there be two W. T.'s, father and son, the father shall have it. FYNCHEDEN. He to whom the remainder is tailed shall have it, and no other." The reporter adds: "*Hasty*, because of the court's opinion, said, the remainder was tailed to us as the fine purports. Ready. *Ham*. It was tailed to our father, and not to you. Ready. *Et alii e contra*."

It may be surmised that Brooke misconceives this case. The court seems clearly to refuse an issue upon mere intention, and puts the matter solidly on the question, so far as the pleading goes, "Who is it that *the document* calls for?" The court at that period (1373) is not troubling itself as to how the jury is going to deal with the question. Doubtless if they, or any of them, should happen to have tidings of any declarations of the writer, these would have their full natural effect in influencing the verdict. As to putting evidential matter into the pleadings, and why you should insert it there, and how, and how much,—a century and a half of curious and important discussion (5 Harv. Law Rev. 313-315) had been going on in the courts between the date of this case and the writing of Brooke's Abridgment. Long before Brooke's time, as it seems, it had come to be allowed that you could have "an averment" of intention in such a case as Peynel's; but at the date of that case it was otherwise.

¹ Not later than 1596-97. See preface to Bacon's *Maxims*, first published in 1629 or 1630.

like the language in Coke's report, imports that *some* inquiry into extrinsic facts is necessary. That, to be sure, is obvious enough, for wills and deeds talk about extrinsic things, and these have to be identified;¹ but it was not always remembered. The maxim appears to have been wholly Bacon's own, and it was well on towards two centuries before the profession took it up. It is likely enough that the Lord Cheyney's Case suggested it. The *intuitus* of it and the state of professional opinion to which it was addressed may be appreciated if one observes the strange pedantry of legal discussion in those days, in cases where the construction of writings was in question; *e. g.*, in the famous case of the Surrey Hospital.²

Bacon seems to have invented the phrases *ambiguitas latens* and *ambiguitas patens*. Quite in the way of the conceptions of that time, he says that an ambiguity which appears in the writing itself can only be cured by the writing itself; *i. e.*, by merely construing the writing, or, in some cases, — as where one who has a hundred acres gives ten acres, — by allowing the choice of any ten. He puts the case of giving land to I. D. and I. S. *et hæredibus*,³ without saying whose heirs, and gives the language in Cheyney's Case, and adds that this sort of thing "cannot be holpen by averment," — *i. e.*, by setting up extrinsic matter to correct it; "for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed." This he is careful to make applicable to wills as well as deeds: "So if a man give land in tail, though it be by will." With this obvious and incurable ambiguity, he contrasts the latent and curable kind, such as had been discussed in Cheyney's Case; namely, the old instance of two things or persons of the same name. There, he says, since the writing is clear upon its face, and the ambiguity only appears extrinsically, you may remedy it extrinsically, and even by proving the actual intention of the writer as

¹ "In every case the words used must be translated into things and facts by parol evidence." — HOLMES, J., in *Doherty v. Hill*, 144 Ma s., p. 468. As to the possible reach of such inquiries, see the remarks of Judge Cooley in 1 Cooley's Blackstone, p. xvii.

² Fanshawe's Case, Moore, 228 (1588), in the Exchequer of Pleas; s. c. in Exch. Chamb. (1588-1589), *sub nom.* Mariot v. Mascal, Anderson, 202, and *sub nom.* Mariot v. Pascall, 1 Leon. 159.

³ "Nota that it is said by my Lord Hussey [C. J. K. B. 1481-1495] that if land be given to two *et hæredibus*, they have only an estate for life; for it is not certain to whom the inheritance is limited." — Keilwey, 108, 26. This was a commonplace. See Altham's Case, *infra*, and *Mirrill v. Nichols*, 2 Bulst. 176.

to which one he meant, since the form of the writing really does describe the thing or person intended. And then he fancifully speaks of another sort of *ambiguitas latens*, where the same person or thing is designated by different names, and allows an averment of some extrinsic matter here, such as goes to identify the person or thing, but not an averment of intention, since the intention "doth not stand with the words."

In *Edward Altham's Case* (8 Co., p. 155), in 1610, these distinctions are gone over again; but the word "ambiguity," patent or latent, does not occur, and there is no sign of any knowledge of Bacon's phrases. A case of equivocation in a fine is stated, and an averment of intention. "This averment out of the fine is good, . . . which well stands with the words." But (citing Year Book cases) a gift to one of the sons of J. S. who has divers, and a limitation to two *et hæredibus*, are uncertain and void by judgment of law, "and no averment *dehors* can make that good which upon consideration of the deed is apparent to be void."

Bacon's maxim was an unprofitable subtlety. In truth, the only patent ambiguity that was not, in some degree, open to explanation by extrinsic matter was one that, in the nature of things, was not capable of explanation. Anything which was capable of it might be explained, as in the case put by Wigram¹ of "a legacy to one of the children of A by her late husband B. Suppose, further," he adds, "that A has only one son by B, and that the fact was known to the testator, . . . no principle or rule of law would . . . preclude a court from acting upon the evidence of facts by which the meaning of an apparently ambiguous will would, in such a case, be reduced to certainty."² Ambiguities, or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done. As to the resort to direct statements of intention, in the one case of "equivocation," *viz.*, where there are more than one whom the name or description equally fits, the right to resort to these declarations in such cases

¹ Extr. Ev. pl. 79.

² Compare the case put by Elphinstone (3 Jurid. Soc. Pap. 266) of a gift "to my nephew John or Thomas," where, extrinsically, it might appear that the nephew was known to the testator by both these names. And see the explicit language of Sir Thomas Plumer in *Colpoys v. Colpoys*, Jacob, p. 463 (1822), declaring that "it has never been considered an objection to the reception of the evidence of . . . circumstances that the ambiguity was patent, manifested on the face of the instrument."

in no way depends on the difference between what is patent and latent.¹

The great *commonplace* in the discussions of the seventeenth century and the first half of the eighteenth, was the Lord Cheyney's Case. When Bacon's maxim was first brought to the general notice of the profession, — namely, I believe, about the year 1761, — it appeared no longer as a maxim relating to averments, but to evidence, and it has ever since been quoted in this sense. By this time the old conceptions had been partly cleared up and enlarged. The limitation of the discussion to averments, to the matter that you could plead, had obscured the subject.

3. It was, of course, as we have seen, always known that construction must take account of the things and persons of whom the document spoke, — that the language must be "translated" into these. This, to some extent, must have included the conditions, circumstances, and relations out of the midst of which and with reference to which the writer spoke. But the courts were shy of going far in that direction, indeed, of going at all beyond the bounds which limit the identifying process, that of ascertaining, in the simplest sense, the persons and things named in the writing.

In 1651,² in ejectment, it appeared upon a special verdict that one who had real estate, and also had goods and chattels worth only five pounds, gave to his wife, by will, "his whole estate, paying debts and legacies," and these debts and legacies amounted to forty pounds. It was held that the lands passed, as well as the goods, and an estate in fee simple. "Hales" (afterwards the Chief Baron and Chief Justice, Sir Matthew Hale) argued, for the plaintiff, that the intention to devise both lands and goods appeared by "the ordinary manner of speech. . . . Also the subject-matter in fact doth prove this to be his intent; and although here is not a collateral averment to prove the intention, but a collateral proof to declare the testator's intent, this may be admitted to ascertain the court of his meaning, as it is in proving an Act of Parliament. In the Lord Cheyney's Case, an averment standing with a will was accounted allowable, though an averment against a will be not," etc.

In 1702,³ on a special verdict in ejectment,⁴ the verdict set forth

¹ Doe d. Gord v. Needs, 2 M. & W. 129; 1 Jarm. Wills (5th Eng. ed.) 400-401. Compare Browne, Parol Ev. § 49.

² Kirman v. Johnson, Style, 293.

³ Cole v. Rawlinson, 1 Salk. 234.

⁴ It is very noticeable how few the extrinsic facts are which one finds in the earlier special verdicts of this sort, *i. e.*, where the purpose is to supply the court with the facts needed in construing a document.

that a widow died seised of the Bell Tavern, and possessed of other leasehold estates, and her will provided, — "I give, ratify, and confirm all my estate, right, title, and interest which I now have, and all the term and terms of years which I now have or may have in my power to dispose of after my death, in whatsoever I hold by lease from Sir John Freeman, and also the house called the Bell Tavern, to John Billingsley." This J. B. was the son and heir of the widow's husband, but not of the widow, and he had already the remainder in tail in the Bell Tavern, after the widow; this was under a settlement of his father, who, being seised in fee of the Bell Tavern, settled it for the use of himself for life, remainder to his wife for life, remainder to his son in tail, remainder to his wife in fee. The question now was what estate John Billingsley took in the Bell Tavern under the widow's devise. A majority of the judges, Powell, Powys, and Gould, held (and it was affirmed afterwards in the Exchequer Chamber and the House of Lords)¹ that he took an estate in fee.

To us of the present time that seems equally good sense and good law. But observe the dissent and the reasoning of Chief Justice Holt, the greatest lawyer of them all. He was unwilling to admit that what appeared upon the natural interpretation of the words, taken alone, to be a life estate, should become an estate in fee by referring to the terms of the father's settlement and the legal relation of his son to the Bell Tavern established thereby:

"Holt, C. J., *contra*, for the intent of a testator will not do, unless there be sufficient words in the will to manifest that intent; neither is his intent to be collected from the circumstances of his estates, and other matters collateral and foreign to the will, but from the words and tenor of the will itself; and if we once travel into the affairs of the testator, and leave the will, we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer, he shall not know how to expound it. Upon the will 't is so, but upon the matter found in a special verdict, 't is otherwise; and what if more accidental circumstances be discovered, and be made the matter of another verdict? Men's rights will be very precarious upon such construction. And as for the honesty of the construction, what if the woman paid a good portion, and was purchaser of this reversion, is it not as honest then to construe it in favor of her heir as to expound it in favor of the right heir of the husband? But we must not depart from the will to find the meaning of it in things out of it. 'T is then a certain rule that to devise lands to H without farther

¹ See note to s. c., 2 Lord Raym. 831.

words, will pass but an estate for life, unless there be other words to show his intent, as forever, or unless he devise for some special purpose which cannot be accomplished without a larger estate ; and as this is a sure rule, so it holds good as well where the devise is of a reversion as where 't is of lands in possession, unless he devise it as a reversion, or take notice of a particular estate, for then his intent may appear upon the face of the will itself ; but if the words be general, and without regard to the nature of the thing, it is otherwise, for it shall not be construed from the nature of the thing, which is extrinsical, but from the words of the will. Ask a lawyer what passes : he says an estate for life, for he knew not that it was a reversion ; and though it be a fruitless estate, and will signify nothing, yet that does not appear till it be found, and therefore when found 't is not to be regarded." ¹

4. But the courts of equity had begun to use a writer's intention in a much freer way. Adhering to the rule that extrinsic intention must not be used to displace or vary that of the writing, they nevertheless found many ways of using it, and even of using the direct oral expression of it. These courts, having no jury, had not before them, in listening to whatsoever evidence might help, the apprehension so often expressed by the common law judges that "it is not safe to admit a jury to try the intent of the testator." ² It must be remembered what is meant by such an apprehension at that period. Not yet had any distinct system of rules for excluding evidence come into existence. The power of judges to set aside verdicts as being against the evidence was not yet well established. It had begun to be exercised, but had not got far. The attain was still the regular way of controlling the jury, and this had practically lost its hold. The jury still held its old character and function, that of a body who might decide on its own knowledge alone, and, if it heard evidence, might decide against it. This power of the jury, and its exemption from any punishment for deciding against the evidence, were vindicated in *Bushell's Case* in 1670.³ The Statute of Frauds, in 1676, relieved against this state of things, by requiring in a great many cases that there should be a writing,

¹ The facts of this case, and the relation of the various parties involved in it to each other, are more fully and, as it would seem, more accurately given in 3 Bro. P. C. 7, where a brief account of the arguments of counsel in the House of Lords is given, but only a bare statement of the result reached by the Lords in 1705. It appears from this report that Chief Justice Trevor, in the Exchequer Chamber, dissented from the opinion of the majority.

² Powell, J., in *Lawrence v. Dodwell*, 1 Lutw. 734 (1698).

³ Vaughan, 135.

or some other specific act of formality, before an action could be brought or a claim established. This, it will be observed, had the same effect which attended a requirement of the sixteenth century and later, that in certain cases there should be two witnesses, or at least one witness;¹ it said, in effect, that it should no longer be true that the verdict of a jury was enough, whether there were witnesses or not. After the Statute of Frauds, — a very extraordinary enactment to have been passed by an English-speaking community in any age, so comprehensive is it and so far-reaching,² — no jury could find a contract of the sort named in § 4, unless there were a writing; or one named in § 17, unless there were either a writing or one of the facts there specified; no jury could find a devise of real estate without a signature and witnesses, as required in § 5, or a will of personalty without writing, except under circumstances indicated in §§ 19 to 23. To the most important dealings of men the Statute of Frauds gave new security. It is not probable that so wide-reaching an Act would have been passed if the only tribunal for the decision of controversies had been the judges. And in construing the statute it was entirely natural that different ideas and methods should prevail in the equity and the common law courts. "This is not," said an equity court, in 1708,³ in considering the question of hearing oral statements of a testator's intention, "like the case of evidence to a jury, who are easily biased by it, which this court is not." In 1736 we read in Bacon's Abridgment (vol. 2, p. 309) that the rule of rejecting —

"Parol evidence . . . to control what appeared on the face of a deed or will . . . has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and to inform the conscience of the court, *viz.*, that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence."

¹ Stats. 1 Ed. VI., c. 12, § 22 (1547); 5 & 6 Ed. VI., c. 11, § 12 (1552), requiring two witnesses in cases of treason; and 21 Jac. I., c. 27 (1623), where the mother of a bastard child who conceals its death is punished as for murder, unless she prove, "by one witness at the least," that the child was born dead. See Hale's practice under this statute, 2 Hale, Cr. Law, 289.

² [It] "carries its influence through the whole body of our civil jurisprudence, and is in many respects the most comprehensive, salutary, and important legislative regulation on record affecting the security of private rights." 2 Kent. Com. 494, note.

³ *Strode v. Russell*, 3 Rep. Ch. 169. The Lord Chancellor Cowper appears to be speaking. He was assisted by the Master of the Rolls, Trevor, C. J., and Tracy, J.

In 1742, Lord Hardwicke complained of his predecessor, Cowper (1705-1710), for doing this sort of thing as regards declarations by a testator of his intention: "He went upon this ground, that it was by way of assisting his judgment, in cases extremely dark and doubtful. . . . I was never satisfied with this rule of Lord Cowper's, of admitting parol evidence in doubtful wills; besides, he went farther in the great case of *Strode v. Russell*." ¹ A practice existed of recognizing a testator's extrinsic declarations of intention, consistent with the will, as regularly admissible in doubtful cases. In 1708, Lord Cowper seemed to allow this when he said,—

"Where the words stand *in æquilibrio*, and are so doubtful that they may be taken one way or the other, there it is proper to have evidence read to explain them, and we will consider how far it shall be allowed, and how far not after it is read; . . . and the distinction in *Cheyney's Case* well warrants the reading of evidence where the intent of the testator is doubtful, as there where a man had two sons, named John, etc., which my Lord Chancellor said differed not from this case, where the words hang in equal balance what settlement he intended." ²

The same judge, as Lord Keeper, had held the same thing in a striking case in 1705,³ where a bequest gave all the testator's household goods, as woollen, linen, pewter, and brass whatsoever, except a certain trunk. The writer of the will was offered to show that the testator directed him to insert all his goods, except the trunk; "and my Lord Keeper thought it might [be allowed], notwithstanding the Statute of Frauds and Perjuries, for it here neither adds to nor alters the will, but only explains which of the meanings shall be taken, as in case of a devise to son John where the testator had two of the same name." ⁴ And in 1750-1751,⁵ Sir John Strange, Master of the Rolls, said,—

"The distinction as to admitting parol evidence I have always taken to be that in no instance it shall be admitted in contradiction to the words of the will; but if words of the will are doubtful and ambiguous, and unless some reasonable light is let in to determine that, the will will fall to the ground, anything to explain, not to contradict, the will, is always admitted. So it is in the case of having two sons of the same name," etc.

¹ *Ulrich v. Litchfield*, 2 Atk. 372.

² *Strode v. Russell*, 3 Rep. Ch. 169. This was not a case of equivocation.

³ *Pendleton v. Grant*, 1 Eq. Cas. Ab. 230, 2; s. c. 2 Vern. 517.

⁴ And so *Docksey v. Docksey*, 8 Vin. Ab. 195.

⁵ *Hampshire v. Pierce*, 2 Ves. 216.

It will be noticed here that the old case of two persons or things of the same name holds the place, not of an exception, but of an instance under a general principle. It figured also in some cases in a similar but more limited way, as standing for a general doctrine relating to names, that errors or uncertainties in names could be corrected by the testator's oral declarations. In 1707 a testator¹ had devised an estate, charged with the payment of a debt of £100 to one Shaw. It turned out that this sum was due, not to Shaw, but to Alice Beck, then the wife of one Fitch. The devisees refused to pay her. In a bill, apparently to enforce the payment, the plaintiff was allowed to show by the one who drew the will that the testator said that he meant the £100 which was due Mrs. Fitch, "the Lord Chancellor [Cowper] declaring he saw no hurt in admitting of collateral proof to make certain the person or the thing described."³ In 1718,² where a legacy was given to Mrs. Sawyer, and there was no such person known to the testatrix, it was alleged that she meant Mrs. Swopper; and a master was directed to inquire who was meant, "and whether the testatrix meant Mrs. Swopper." So, in the well-known case of *Beaumont v. Fell*,⁴ in 1723, where, under a bequest to Catherine Earnley, Gertrude Yardley was allowed to take, evidence was admitted of declarations of the testator that "he would do well for her by his will." And Lord Hardwicke, in considering a testator's declarations of his meaning, repeatedly recognized such a rule, as in 1742,⁵ —

"I do not know that upon the construction of a will courts of law or equity admit parol evidence,⁶ except in two cases,—first, to ascertain the person, where there are two of the same name, or else where there has been a mistake in a Christian or surname; and this upon an absolute necessity; as in Lord Cheyney's Case, where there were two sons of the name of John. . . . The second case is with regard to resulting trusts relating to personal estate, where a man makes a will and appoints an executor with a small legacy, and the next of kin claim the residue."⁷

¹ *Hodgson v. Hodgson*, 2 Vern. 593.

² s. c. 1 Eq. Cas. Ab. 231. In the margin to this report it is stated that in Prec. Ch. 229, the case is given as one where the testator had given the woman's maiden name, having forgotten that of her husband. But the report in Prec. Ch. does not support this statement.

³ *Masters v. Masters*, 1 P. Wms. 421.

⁴ 2 P. Wms. 141.

⁵ *Ulrich v. Litchfield*, 2 Atk. 372.

⁶ Here is the familiar ambiguity in using the phrase "parol evidence" for extrinsic expressions of intention.

⁷ So also in *Baylis v. Attorney-General*, 2 Atk. 239 (1741).

5. Lord Hardwicke here mentions as his second case a famous sort of instance that figured much in the books for a century and a half, from the English Revolution to the Statute 1 Wm. IV. c. 40, in the year 1830. It was the rule of English law that where a testator left personal estate undisposed of, and appointed an executor, this personage took the surplus. "At law it has been the rule from the earliest period that the whole personal estate devolves on the executor; and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially."¹ On the top of this, however, the equity courts laid down a rule of presumption or construction, that in case a gift was made to the executor by the will, this indicated a purpose not to give him the surplus; and in such a case he was held *prima facie* not entitled to it. A contrary intention might, indeed, be apparent from the whole will; but if it were not, then it might be extrinsically proved by the declarations of the testator. Such declarations, it will be observed, supported the *prima facie* right of an executor, and were only received "to rebut the equity." Although when these declarations were received they might be met by others in a contrary sense, yet no declarations were directly and in the first instance receivable to contradict the right of the executor.² Nor where the construction of the will was plain, against the executor, as in the case, at least in modern times, where the gift was, in terms, for his care and trouble, was it permitted to introduce extrinsic declarations of intention.³ This matter, for the most part, as I said, came to an end in 1830 by the Statute 1 Wm. IV. c. 40. The doctrine, before that, having been that "the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take,"⁴ now, the statute changed the fundamental rule as to an executor's *prima facie* right, and made him primarily a trustee of the residue for the next of kin, "unless it shall appear *by the will or any codicil thereto*" that he "was intended to take . . . beneficially." It will be observed that not merely did it change the fundamental rule, but it expressly required that the intention to give to the executor beneficially should appear by the writing.⁵

¹ 2 Williams, Executors, *1327 (5th Am. ed.).

² Lady Osborne v. Villiers, 2 Eq. Cas. Ab. 416, 12; Cloyne v. Young, 2 Ves. 95.

³ Langham v. Sanford, 17 Ves. 435 (1811).

⁴ Sir William Grant in Pratt v. Sladden, 14 Ves. p. 197 (1807).

⁵ Williams v. Arkle, L. R. 7 H. L. 606; compare Love v. Gaze, 8 Beav. 472.

Under this general head of "rebutting an equity" may be brought all the other cases of a resulting trust, the presumption against double portions, and the like. It has been stated as a general principle that where "the document is of such a nature that the court will presume that it was executed with any other than its apparent intention," the apparent intention may be shown to be the real one.¹ In such cases the testator's extrinsic declarations of his purpose are not admitted as adding to the document, or varying or contradicting it; nor are they received as evidence in aid of interpretation. They come in as an incident to the "equity," as a ground of relief against the operation of an equitable rule which refused its usual construction to the document. "In such case" (rebutting a resulting trust), says Jarman,² "it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but against a mere equity arising by implication of law."

6. In the course of the discussion that went on in the courts of equity, during the eighteenth century, over the admissibility of "parol evidence," — meaning thereby extrinsic declarations or other direct evidence of intention, — the conception had been clearly brought to light of using these and all other extrinsic matters merely as evidence to aid in the process of interpretation, as contrasted with grounding upon them a substantive right or defence. In *Goodinge v. Goodinge*,³ in 1749, where there was a legacy to such of a man's nearest relations, as his executors "should think poor and objects of charity," "evidence was then offered of the testator's having poor relations in Salop, and that he knew thereof; to which was objected the rule by Holt, C. J., in *Cole v. Rawlinson*,⁴ that the intention of the testator is not to be collected from collateral and foreign circumstances. Lord Chancellor [Hardwicke]: That rule is laid down much too large by Holt; for in several cases it is admitted that it must be allowed, *viz.*, where the description or thing is uncertain (not only where two of the same name), it must be admitted to show that the testator knew such a person, and used to call her by a nickname. Although parol evidence cannot be read to prove instructions of the testator, after the will

¹ Steph. Dig. Ev. Art. 91. See also 1 Jarman, Wills (5th Eng. ed.) 390-392; Reynolds v. Robinson, 82 N. Y. 103.

² Wills (5th ed.), 391.

³ 1 Ves. 231.

⁴ *Ante*, p. 425.

is reduced into writing, or declarations whom he meant by the written words of the will, yet that is different from reading it to prove that the testator knew he had such relations, to establish which fact it may be read, but not to go any farther. And though this is a nice distinction, yet it is a distinction in the reason of the thing." About a year later, in *Hampshire v. Pierce*,¹ in construing a gift by will "to the four children of my late cousin Elizabeth Bamfield," it appeared that she had six children, two by a former husband, Poddlecomb, and four by a later one, Bamfield. The Master of the Rolls, Sir John Strange, in dealing with an argument that the word "four" should be rejected, and a counter offer to show the extrinsic declarations of the testatrix, said: —

"As there is some uncertainty, I have admitted the going into evidence to explain the intent of the testatrix in the expression 'the four.' . . . The testatrix declared . . . that she had provided for Mrs. Bamfield's four children. . . . She also puts a negative on the other two; . . . so that taking this on the face of the will, in which also the circumstances of the family must be taken altogether, it appears clearly that the four children by the second husband were those meant to share the £100."

It is fairly plain that in these cases we have got to the idea, not merely of construing the will by reference to the facts and circumstances of the case, as contrasted with that strict and mere inspection of the text of which people sometimes talked, but to the conception of using even the testator's extrinsic declarations as evidence to assist in giving to the text its right meaning. If the Master of the Rolls, in 1750, might think it possible, logically, to help himself out of an uncertainty in such a way as this, why should it not generally be so used in any like case? Well, evidently it would be highly dangerous to do it, even for a court of equity, and merely "to inform the conscience" of the judge. And when you come to the jury of a common law court, it would be dangerous in the extreme. But, for all that, it should be carefully borne in mind that in the nature of things this evidence might often help, merely as evidence, in putting a construction on the text. It was not a denial of this, which under the new aspect of the subject, still, and with greater rigor, kept out these extrinsic declarations of intention; for in the stock case of equivocation, where it was let in, the courts were content to think that they used these declara-

¹ 2 Ves. 216.

tions in a merely evidential way. "The intention," said Lord Abinger, for the Court of Exchequer, in 1839,¹ "shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction." And the judges, where they cannot receive it, sometimes recognize its probative force. "If the direct evidence of intention," said Lord Selborne, in *Charter v. Charter*,² "which has been offered by the respondent, independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty."³

7. As regards all other extrinsic matter which might help in construing a document, used merely as lights to read it by, the courts by the middle of the eighteenth century had in a good degree escaped from the bondage of the earlier days. While it was true that allowing extrinsic matter thus to be brought into view and used, did make it impossible for any man to construe a fine, a deed, or a will by merely reading it over and dealing with it grammatically, yet it was more and more evident that such a thing was never literally possible, and that the enlargement of the field of view, like a thousand other enlargements, although it might be dangerous, was necessary.

One relic of the old notions remained, and still haunts our cases. It was said that so long as a document is susceptible of a clear and certain interpretation upon the face of it, there must be no resort to anything extrinsic; as if it were ever possible unless in the rarest cases, to tell whether such an interpretation is allowable, without looking beyond the paper. The influence of this idea is seen in a leading and liberal case, *Fonnereau v. Poyntz*,⁴

¹ *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363. In 1833, in *Richardson v. Watson*, 4 B. & Ad., p. 799, Parke, J., said that in such cases the "evidence is admissible to show which manor was intended to pass, and which son was intended to take. Such evidence is admissible to show, . . . not what the testator intended, but what he understood to be signified by the words he used in the will." And three years later, in *Doe d. Gord v. Needs*, 2 M. & W. 129, the same judge, now Baron Parke, said, "The evidence . . . has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects, . . . and to determine which of the two the devisor understood to be signified by the description." Wigram in his *Extr. Ev.*, pl. 152, says, "Perhaps the . . . explanation is that the evidence only determines what subject was known to the testator by the name or other description he used."

² L. R. 7 H. L. 364.

³ Upon this point see the very valuable papers of Hawkins and Nichols in 2 *Jurid. Soc. Papers*, cited below.

⁴ 1 Br. C. C. 472.

in 1785, where it was a question whether a testatrix had given to certain persons a gross sum of £500, and other amounts, or only an annuity. The will showed that she also meant to provide for some other persons, while the state of her property, if it could be looked at, indicated that she could not have meant to give annual payments of such large amounts. Lord Thurlow, at first, was of opinion that the meaning of the will, read by itself, was so clear for the annuity that he could not look at the extrinsic facts; but afterwards he persuaded himself that it was sufficiently doubtful to allow him to examine these facts,—not, as he was studious to explain, to control bequests that were distinctly made, or in respect to a subject accurately described, but to explain matter that was doubtful upon the mere construction of the words of the will, taken as a whole.

This theory, more or less definitely expressed, is found in many cases.¹ The court, in such cases, seems to conceive that it is practicable to divide the extrinsic facts, to look at such of them as identify the persons and things apparently referred to, and then stopping there, to decide whether there be a "latent ambiguity." According as one is discovered or not, they then admit evidence of further extrinsic facts to clear it up, or reject this evidence altogether. Such seems to be the method in the minds of Chief Baron Kelly and Baron Martin in *Grant v. Grant*.² It is what the court puts forward in *Kurtz v. Hibner*,³ where a testator, owning only one eighty-acre tract in a certain township, had called it section thirty-two by mistake, when it really was section thirty-three. In holding that the true section did not pass by the will, the court says; "There is no ambiguity in this case, as is urged. When we look at the will, it is all plain and clear. It is only the proof *aliunde* which creates any doubt, and such proof we hold to be inadmissible."⁴ But this method is now justly discredited. Wigram's book, in 1831, gave it a death-blow. The sound and simple principle is that

¹ *E. g.*, in *Brys v. Williams*, 3 Sim. 573.

³ 55 Ill. 514.

² L. R. 5 C. P. 727.

⁴ The true view of such a case appears to be that there is no question of ambiguity in the matter, there is a mistake; and the question is whether the will, taken as a whole, admits of a construction which will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are receivable, and then the inquiry is whether, in view of all these facts, anything passes. And so it was held in *Patch v. White*, 117 U. S. 210, where, however, a sound opinion is hurt by joining in a resort to the maxim about ambiguity. Compare *Newburgh v. Newburgh*, Sugden, *Law of Property*, 367; s. c. 5. Madd. 364; *Thayer's Cases on Evidence*, 847, 931-933.

which is excellently illustrated by Mr. Justice Bradley, in dealing with a contract of insurance, in *Reed v. Insurance Co.*, in the Supreme Court of the United States;¹ by the Lord Chancellor Cairns, in *Charter v. Charter*;² and by Mr. Justice Blackburn, in *Grant v. Grant*³ and *Allgood v. Blake*.⁴ "There is a class of evidence," said Lord Cairns, in *Charter v. Charter*, "which in this case, as in all cases of testamentary dispositions, is clearly receivable. The court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied."⁵

8. As to Bacon's maxim, every one knows how much it has figured in the modern cases. But, at first, it seems to have lain for more than a century and a half unnoticed by the profession. So far as I have observed, it comes first to light, as a part of our legal literature, in 1761, in a little anonymous book, "*The Theory of Evidence*," apparently written by Bathurst, then a Justice of the Common Pleas, and afterwards Lord Chancellor Apsley, the uncle of Buller. This work became afterwards part six of what we know as Buller's "*Nisi Prius*," a book which was originally published anonymously, before Buller could have written it, and which, in its first edition, was sometimes called "*Bathurst on Trials*." In a slight attempt, to give shape to the rules of evidence, it was said, in the "*Theory of Evidence*," that "the fifth general rule is, *Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur*;" and this was accompanied by further quotations from Bacon, and by a few modern instances as late as 1751.⁶ There is no indication that the writer, in thus exhuming Bacon's sixteenth century exposition, was aware how he was mingling old conceptions with new and very different ones. He produced it now as a rule of evidence, and not of pleading. The

¹ 95 U. S. 23 (1870).

³ L. R. 5 C. P. 727 (1870).

² L. R. 7 H. L. 364 (1874).

⁴ L. R. 8 Ex. 160 (1863).

⁵ See Nichols, Extr. Ev., 2 Jurid. Soc. Pap. 374, 375.

⁶ There was, perhaps, a touch of the maxim in *Jones v. Newman*, 1 W. Bl. 60, in 1750, where there were two John Cluers, and the trial judge had refused the offer to prove by parol evidence that the testatrix intended to leave it to John Cluer the son. In granting a new trial the court is reported as saying, "The objection arose from parol evidence, and ought to have been encountered by the same."

great name of the author of the maxim gave it credit. It seemed to offer valuable help towards settling the troublesome question as to how far you could go in looking at outside facts to aid in construing a written text. To say that a difficulty which was revealed by outside facts could be cured by looking further into such facts, had a reasonable sound; and when it was coupled with a rule that you could not in any way remedy a difficulty which was apparent on the face of the paper, there seemed to be a complete pocket precept covering the whole subject. When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon. The maxim caught the fancy of the profession, and figured as the chief commonplace of the subject for many years. It still performs a great and confusing function in our legal discussions. But Wigram,¹ seventy years after it was thus brought newly to light, abandoned the use of it, and showed how uninformative it is; and the lesson has been abundantly repeated since.

Bacon, when he spoke of ambiguities patent and latent, meant only a limited sort of thing, *viz.*, what he said, *ambiguity*. But now his maxim, which was unfortunately treated as covering the entire subject, was made to apply to all sorts of defects. It could only do duty as a general exposition by being strangely misinterpreted and strangely misapplied, *e.g.*, to the question of filling a blank which a testator had left in his will, or, as we have seen, to the correction of an error, where one thing was expressed, and another meant. If *any* error of expression was apparent on the face of the document, this was called patent ambiguity, and the courts sometimes undertook to reconcile the correction of it with the maxim which forbade this. The maxim had another singular operation: it was sometimes admitted that defects and errors were not ambiguities, and *therefore*, it was said, they are incurable, as when the dissenting opinion in *Patch v. White*² says: "If there is any proposition settled in the law of wills it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be necessary to explain a latent ambiguity; and a mere mistake is not a latent ambiguity. Where there is no latent ambiguity, there no extrinsic evidence can be received." It became common to say that the first effort must be to disclose the existence of a

¹ Extrinsic. Ev. His preface is dated 1st January, 1831.

² 117 U. S., p. 224.

latent ambiguity by extrinsic evidence; and then, according as this was successful or not, more extrinsic evidence was or was not receivable. In like manner, in a case where the true objection was that the words of a contract would not bear the construction sought to be placed upon them, and therefore there was no place for evidence, the court strangely resorted to the maxim: "No rule," it was said, "is more familiar and well-settled than that which decides that the terms of a written contract, not presenting a case of latent ambiguity, are not to be varied by extrinsic and parol evidence."¹

9. Wigram's valuable little book, in 1831, went far to clear up the confusion that had gathered over the subject. He was led to write it, as he says in the Advertisement to the first edition, by being accidentally present at the hearing of the case of *Goblet v. Beechey*, before Vice-Chancellor Leach, in July, 1826, — a case of which he gives some account in an appendix. This book lacks a historical exposition of the subject, and it does not clearly discriminate those parts of it which belong to the law of evidence from the rest. The cases, also, are not so thoroughly analyzed, or treated with so free a hand, as might be wished. Owing, furthermore, to the use of an "interpretation clause" near the beginning (pp. 9 and 10), and to the use of the phrase of "evidence to prove intention" in a special sense, his meaning is often misconceived.

But the book brings out and stamps upon the mind of careful readers two or three things of capital importance: 1. That Bacon's maxim is inadequate and uninstructional; 2. That extrinsic expressions of the writer's intention cannot be resorted to in aid of the exposition of a will, except where a person or thing is described in terms equally applicable to two or more; and 3, that there is no excluding rule of evidence peculiar to this subject, except that which rejects extrinsic evidence "to prove intention itself as an independent fact." The seven propositions which are the substance of the book amount to this: A testator, unless the text, read as a whole, shows the contrary, presumably uses words in their primary sense. If the extrinsic facts of the case allow of the words having this sense, they must have it. If they do not, the words must have such other secondary sense as they are capable of, in view of these facts. If the words are obscure, or unintelligible to the court, resort may be had, in deciphering or translating them, to

¹ *Black v. Batchelder*, 120 Mass. 171 (1876).

the aid of competent witnesses. As regards persons and things indicated by the testator, and as regards "every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words," a court may look at every extrinsic fact which is not excluded by the general rules of evidence, with one single exception. There is one excluding rule of evidence, namely, that not even to save a will from being void for uncertainty can "evidence to prove intention itself" be received, unless in the case of equivocation; namely, where a person or thing is described in terms applicable, equally, to more than one.

Wigram did not exhaust the subject. The valuable discussions of Hawkins and Nichols¹ are enough to show that Wigram's exposition is imperfect, and open to criticism as regards what is covered by the excluding rule of evidence. He puts it that actual intention cannot be used at all in evidence, in order to determine the meaning of the document, and therefore (allowing only for the well-known exception) that all evidence of "intention as an independent fact" is inadmissible, whether it be direct expressions or other extrinsic matter. But, in fact, a great deal of the evidence which is on all hands conceded to be admissible, such as the relations of affection, or the contrary, between the testator and a person named, and his habits or mode of speech, tends strongly to show his intention. Probably it is neither practicable nor desirable to shut out the natural operation of such evidence, or to make the excluding rule cover anything more than that peculiarly dangerous kind of evidence of intention, the writer's extrinsic expressions. That is the thing, as we see, which has for centuries been prominently discussed, and which is alone named in the great exception to this rule, *viz.*, the case where there are two of the same name. To this effect are the best modern cases;² and

¹ 2 Juridical Soc. Papers, "On the Principles of Legal Interpretation, with Reference especially to the Interpretation of Wills." By F. Vaughan Hawkins, Esq. (May 21, 1860), pp. 298-330; "On the Rules which ought to govern the Admission of Extrinsic Evidence in the Interpretation of Wills," by Francis Morgan Nichols, Esq. (Dec. 3, 1860), pp. 351-384.

² *E. g.*, "Parol evidence of statements of the testator," Lord Cairns in *Charter v. Charter*, L. R., 7 H. L. 364. "Direct evidence of intention, . . . independently of the light thrown by extrinsic facts," Lord Selborne, *ibid.* "There is but one case in which *this sort of evidence of intention* can properly be admitted," etc., Lord Abinger, for the court, in *Hiscocks v. Hiscocks*, 5 M. & W. 363. "Declarations of the testator, or other direct evidence of intention," 1 Jarman on Wills (5 Eng. ed.), 401.

such is the tendency of the excellent papers, above referred to, of Hawkins and Nichols.¹ Of course, some conduct, such as a gesture, is merely tantamount to a verbal expression of intention, and comes under the same rule. Of course, also, where bare intention is not really evidential, the exclusion of it needs no explanation.

James B. Thayer.

CAMBRIDGE.

¹ See also Hawkins, *Constr. Wills*, *9: "Parol evidence to show what were actual testamentary intentions of the testator (such as the instructions given for the will, memoranda, or declarations by the testator as to what he had done or meant to do by his will, etc.) is admissible only to determine which of several persons or things was intended under an equivocal description."

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THE LAW SCHOOL. — It has not been generally known, until very recently, to whom the Law School owed the fund which was given a number of years ago to found the so-called New Professorship, at present held by Professor Thayer. The obligation to secrecy has been removed by the death of the donor, William Fletcher Weld, Esq., a member of the class of 1879, in the Law School, and of the College class of 1876.

By the death of the annuitant to whom the income of the fund was to be paid during life, another gift has become available. This is the bequest left by George Bemis, Esq., a graduate of the College in 1835, and of the Law School in 1839, to found a professorship of International Law. The fund now amounts to \$50,845.23, or enough to yield only about half the sum now paid to the senior professors. It was Mr. Bemis's wish that the incumbent should be a jurist who had been in public life or in the diplomatic service, or who at least had lived abroad; and also that he should be "not merely a professor of the science but a practical co-operator in the work of advancing knowledge and good-will among nations and governments." As President Eliot says, in his Annual Report, it will be difficult to fill this chair.

AMONG recent accessions to the Library is one which deserves notice, not only because of its importance, but also because of the circumstances under which it was obtained. There is now on the way from Australia a complete set of the reports of New South Wales, Victoria, Queensland, and South Australia. Some of these reports are exceedingly scarce; and the Law School owes the set in question solely to the kindness of Hon. Samuel J. Way, Chief Justice of the Supreme Court of South Australia, who not only gave his time to its collection, but, on account of the distance, even advanced the purchase-money out of his own pocket. Such friendliness is not common.

SINCE the appearance of the December number, seven more students — five in the first-year class, and two specials — have entered the School. This brings the total registration up to one more than four hundred.

In addition to the extra instruction announced in the Annual Catalogue, Professor Beale is delivering a course of six lectures on the Law of Damages, — substantially a repetition of those given by him two years ago.

THERE are many reasons why the REVIEW takes great pleasure this month in offering to its readers an article from Sir Frederick Pollock. Harvard men naturally feel an interest in him, because of his very cordial references in the past to the Law School and its methods. Apart from that, no English lawyer off the bench is better or more deservedly known in this country than he, both on account of his prominence in the reform of English legal education, and through his books. But from its own standpoint the REVIEW is most of all gratified in numbering him among its contributors because he stands on the other side of the Atlantic, or indeed throughout the English-speaking world, for the very best — if such a way of putting it is not too presumptuous — in the REVIEW's own field. The Law Quarterly Review, which Sir Frederick Pollock has edited from the start, was as new a departure in England as it certainly would have been in the United States. It was the first periodical there, and is still the only one, which has given the scientific, the historical, and the philosophical aspects of the law an equal place by the side of those that are more practical. Its readers know with what ability it has fulfilled its double purpose, and also — a thing one cannot often say of legal literature — they are grateful indeed for the refreshing excellence of its literary quality. In the sense of furnishing a lawyer's armory with weapons for immediate use, such a magazine may not be so serviceable as one which deals more exclusively with litigated questions. But, after all, one hears that kind of argument quite often enough; it comes from the same spirit which is fast making the law in this country, or at least struggling to make it, a trade rather than a profession. Even in England there are not wanting signs of a like spirit; and it is perhaps Sir Frederick Pollock's best claim to gratitude that his whole effort, as editor, author, and educator, has been given to resist it.

ORDERLY CONDUCT AS CONSIDERATION. — The Northwestern Law Review for February objects to a recent decision of the Supreme Court of Victoria that the defendant's agreement to pay a stipulated monthly sum to his divorced wife, in consideration that she "shall conduct herself with sobriety, and in a respectable, orderly, and virtuous manner," is binding. One judge dissented, on the ground of vagueness. That objection, however, seems hardly sufficient; for these adjectives, general as they are, have such a well-defined meaning, especially as applied to a woman, that it would seldom be difficult to apply them. The promise to a boy in consideration that he would not "bore" his father, is decidedly a more extreme case, and was properly held too vague.

The court also seems correct in holding that there was a detriment, since, as moral laxity and legal liability are not coextensive, the woman gave up her undoubted legal right to an occasional mild intoxication, as well as her right to enjoy company and manners that are permitted by law, but not by society. A large class of useful citizens spend their lives mostly

within this borderland, and surely to renounce it may be the basis of a contract right.

The serious difficulty in such cases is always one of fact, whether there was the intention to give the promise in exchange for the abstinence. (It is usually clear that the abstinence is in exchange for the promise.) It is on this ground that it is natural to find apparent conflicts, as in promises of reward from fathers to sons for various kinds of good conduct; for it is almost impossible in many cases to tell a promise to make a gift on a condition, from an offer for a contract. As a rule it is really a case of guessing on rather subtle psychological grounds, and the courts probably keep as near to the facts in leaning towards finding a consideration as they would in tending the other way.

OWNERSHIP AND POSSESSION OF AEROLITES. — A case which has excited much comment in the last few months is that of *Goodard v. Winchell*, 52 N. W. Rep. 1124, decided by the Supreme Court of Iowa. An aerolite, weighing sixty-six pounds, fell on the prairie land of the plaintiff, and embedded itself to a depth of three feet below the surface of the soil. The grass privilege of the land had been leased by the plaintiff to a tenant, by whose order the aerolite was dug up and sold to the defendant. The plaintiff brought an action in replevin against the defendant. Counsel for the defence invoked the rule of title by occupancy, and cited Blackstone to prove that "occupancy is the taking possession of those things which before belonged to nobody," and that "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." The plaintiff prevailed, however, the court being of opinion that the aerolite was not a "movable" within the spirit of the rule cited. The reasoning on which the decision proceeds is most ingenious; thus, we find "that to take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observation, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables." Whether or not one believes this to be the true underlying theory of the decision, — and the correctness of the result actually reached is undoubted, — one cannot but regret that the court failed to consider the question of possession as well as that of property, so often have the facts of the case provoked discussion.

There are two essential elements to actual possession of a chattel: (1) the power of control, which is a question of fact; and (2) an intention to make a use inconsistent with the right of another to immediate control. The second element includes, of course, the intention to prevent others from interfering with the proposed use. The intention governs, and has been considered from either of two points of view. Holmes believes it to be the intention to exclude others; while the German writers look upon it as the intention to use for one's own purposes, without reference to others. That power of control must be coupled with intention to exclude in order that there may be actual possession, is shown by Holmes in an apt illustration. "If," he writes, "there were only one other man in the world, and he was safe under lock and key in jail, the person having the

key would not possess the swallows that flew over the prison." One may go farther with this illustration, and show that there would have to be something more than a power of control and an intention to exclude others, in order to give the person having the key actual possession of the chattels about him. If, for instance, he were a man of discrimination, he would see on all sides things he would not want, though they were within his control, and he did not intend to allow the prisoner to use them; and of those things he could not be said to be possessed. In other words, it is best not to look at the element of intention from either of the above-mentioned points of view exclusively: for actual possession of a chattel there must be power of control; an intention to make a use inconsistent with possession in any one else; and an intention to exclude every one else from interfering with such use. These two intentions must be joined, for they are complementary. Applying these principles to the leading case of *Merry v. Green*, 7 M. & W. 623, one finds there was an intention on the part of the plaintiff to use the contents of the secretary and to exclude others, and that this intention was fulfilled, and therefore possession was taken. Coming to the Iowa case, to find the requisite intention one must go back of acquiring of title to the land: ownership of the land includes an intention to make use of the rights of ownership in the well-known cases of animals *feræ naturæ*, and falling fruit. And so here, the plaintiff must be taken to have intended to appropriate to his exclusive use aerolites, as he would rain and snow which might fall upon his land.

THE POLICE POWER AND THE LAKE FRONT CASE.—That interesting and dangerous thing called the police power, as noticeable for its vagueness as for its necessity, is often rather wildly talked about, though the actual decisions have confined it, with fair success, to the protection of the public health and the public morals, on the one hand, and on the other to limiting the legislative power to acts which may within the bounds of reason be supposed to lead towards the objects which the Legislature is authorized to seek. In the Chicago Lake Front Case¹ the Supreme Court have said that, as the soil under navigable waters is held by the people of the State in trust for the common use, any legislation concerning their use affects the public welfare. "It is therefore appropriately within the exercise of the police power of the State." The decision must go the whole length of the language, for the grant was made twenty-five years ago, when it was much less valuable, and it was so carefully conditioned that the least infringement by the company of public rights would forfeit their title. The decision must be that any large grant of the kind is a license revocable by the Legislature whenever in the judgment of the court such an interpretation would largely promote the pecuniary welfare of the community; for it is here only pecuniary welfare that is affected: the community saves what constitutional confiscation would cost.

These large questions of the division of the sovereign powers among the departments of our government cannot be adequately treated by curt logical reasoning, but call rather for trained political instinct and broad judgment. Therefore, to say that the minority judgment is clearer and supported by authorities more direct, is not necessarily to prove that it is sounder; nevertheless, their arguments are very hard to escape. The power to grant such land, they reason, is admitted by the majority, and

¹ *Illinois Central R. R. Co. v. State of Illinois*, 13 Sup. Ct. Rep. 110.

it is difficult to say by what principle the extent of the grant is to be limited, as that is matter of legislative discretion, having regard to the reasonable connection of the means with the end; and it is impossible to say that the amount of land granted in this case is absurdly beyond the needs of a great railroad for its terminal facilities. Besides the difficulty of seeing on general principles why this is a wholly unreasonable use of legislative discretion, there remains the difficulty of former holdings of the court. "We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*," *Smith v. Taylor*, 9 Cranch, 93. "It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts," *Stone v. Mississippi*, 101 U. S. 814. To go back on a principle so generally understood as this, is a radical thing to do, needing strong ground. The value of the present decision as an indication of the overthrow of this principle is weakened by its closeness, the Chief Justice and Mr. Justice Blatchford not taking part, and Mr. Justice Gray and Mr. Justice Brown concurring in the dissenting opinion of Mr. Justice Shiras.

RECENT CASES.

ARREST, ON CIVIL PROCESS — EXTRADITION. — Petitioner was in jail for a criminal offence. The day before the expiration of his sentence, on the requisition of the governor of another State, a warrant was issued for his apprehension. The next day, and after the expiration of his sentence, he was apprehended; but the keeper refused to surrender him, on the ground that on the previous day the prisoner had been entered on the jail-book as arrested on a civil writ, and committed for want of bail. The petitioner gave a bail-bond, and claimed a discharge on the ground that extradition proceedings could not be had against him while under arrest on civil process. *Held*, that the mere entry of a commitment on the jail-book did not constitute an arrest, and petitioner was properly held under the executive warrant. *In re Harriott*, 25 Atl. Rep. 349 (R. I.).

It seems that but two cases have arisen directly upon this point in the United States. *William v. Bacon*, 10 Wend. 636, and *Ex parte Rosenblatt*, 51 Cal. 285, both of which seem to be in general accord with the principal case.

BILLS AND NOTES — INDORSEMENT. — The payee of a note, a married woman, to accommodate the maker, wrote on the back of the note, "I hereby charge my separate estate with the amount of this note. [Signed] E. B. R." *Held*, that she was liable as indorser; for, as these words were equally consistent with any kind of an obligation, they had no effect on her signature, which without these constituted an ordinary indorsement. *Robertson v. Rowell*, 33 N. E. Rep. 898 (Mass.).

The words written above the signature set forth no obligation in themselves, but imply the existence of some other obligation to which they are collateral; and the natural inference from the situation is that this implied obligation is an ordinary indorsement. The court distinguishes this case from that of a guaranty — a distinct obligation — written by the transferor. Cf. 2 Daniel Neg. Instrs. § 1781-83.

BILLS AND NOTES — UNITED STATES CIRCUIT COURTS — JURISDICTION. — Act of Congress (25 Stats. at Large, p. 434) enacts that the circuit courts shall have jurisdiction over suits by assignees only in cases where the court would have had jurisdiction if no assignment had been made. In an action on a promissory note made for the accommodation of the payee, who was a citizen of same State as the maker, and indorsed to plaintiff, a citizen of another State, it was *held*, that the circuit court had jurisdiction, as the payee never had a cause of action against the maker, and therefore in indorsing the note did not assign, but created a cause of action which was at its inception a claim between citizens of different States. *Holmes v. Goldsmith*, 13 Sup. Ct. Rep. 288.

BILLS AND NOTES — WANT OF CONSIDERATION — BURDEN OF PROOF. — In an action on a draft, where defendant set up want of consideration, — *held*, that as it was an affirmative defence, the burden of proof was upon defendant. *McKenzie v. Oregon Imp. Co.*, 31 Pac. Rep. 748 (Wash.).

This decision seems correct on principle, but the authorities are in conflict. In accord with the principle case are: 83 Ala. 213; 16 Oregon, 437; 10 Bush, 234. But see *contra*; 62 Me. 155; 1 Allen, 412; 9 R. I. 76.

CONFLICT OF LAWS — STATUTE OF LIMITATIONS — ABSENCE FROM STATE. — The Illinois Statute of Limitations (Rev. St. c. 83, § 18, 20) provides that the time of a debtor's residence out of the State shall not be part of the time limited for the commencement of actions; and further, that when a cause of action has arisen in another State, and is barred by the laws of that State, no action shall lie thereon. *Held*, that where a debtor left the State before a cause of action arising therein was barred, and was sued as soon as he returned, it was no defence to the action that while out of the State he lived in another State long enough to bar the action according to the law of that State. *Woolley v. Yarwell*, 32 N. E. Rep. 891 (Ill.).

The decision is clearly correct. The Illinois Statutes make no exception of the case; and the courts cannot merely for the sake of comity recognize a foreign law that conflicts with the policy of domestic legislation.

CONSTITUTIONAL LAW — JURISDICTION IN AID OF INTERSTATE COMMERCE COMMISSION. — The twelfth section of the Interstate Commerce Act authorizes the Interstate Commerce Commission to inquire into the business and management of all carriers engaged in interstate business, and to subpoena witnesses for this purpose, and in case of disobedience to invoke the aid of the circuit courts of the United States. The courts may issue an order compelling obedience to the subpoena, and may punish failure to obey the order as contempt. *Held*, that the commission was an administrative, not a judicial body; that its application to the courts was not a "case" or "controversy," and therefore not within the jurisdiction of the United States Courts as declared by the Constitution; and that the section of the Interstate Commerce Act attempting to give jurisdiction was unconstitutional. *In re Interstate Commerce Commission*, 53 Fed. Rep. 476 (C. Ct., Ill.).

This decision is in the same line as the early cases on the subject of the jurisdiction of the Federal courts, and follows Field, J.'s decision in *In re Pacific Railway Commissioners*, 32 Fed. Rep. 251. It is a most damaging blow to the power of the Interstate Commission, which is left unable to compel witnesses to testify.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS. — When plaintiff recovered his judgment in an action based on contract, the rate of interest on judgments was seven per cent. A New York statute changed the rate to six per cent. *Held*, that interest on a judgment is not a part of the contract, but is in the nature of damages; that therefore a statute changing the rate of interest not yet due did not impair the obligation of contracts within the meaning of the United States Constitution. *Held*, also, that as the plaintiff was entitled under the statute to have his claim tried by the highest court of his State, he was not deprived of property without due process of law. Harlan, Field, and Brewer, JJ., *dissent*. *Morley v. Lake Shore R. R. Co.*, 13 Sup. Ct. Rep. 54.

A judgment is of course not a contract *proprio vigore*, within the meaning of the Constitution, — *i. e.*, a consensual contract, as opposed to one implied in law. *Louisiana v. Mayor*, 109 U. S. 285. But the dissenting judges say that there is a term in every contract, implied in fact and constructively present to the minds of the parties, that in case of a breach the injured party shall have not only damages, but interest on such damages at the rate then existing; they therefore hold that the statute in question impairs the obligation of contracts.

CONSTITUTIONAL LAW — PENAL LAW — GIVING FAITH TO RECORDS OF ONE STATE IN THE COURTS OF ANOTHER. — Stat. N. Y. 1875, c. 611, makes directors of corporations liable for its debts if they make false returns, and stockholders personally liable to the amount of their stock for debts contracted before the capital stock is fully paid in. A was held liable personally to plaintiff on both grounds by the New York court. Plaintiff then sued in the Maryland court to have a transfer by A of his property set aside as fraudulent, and to have such property subjected to the payment of the New York judgment. The bill was dismissed on the ground that the New York judgment was for a penalty, and therefore was not enforceable outside of that State. Plaintiff sued out writ of error on the ground that this decision failed to give "full faith and credit" to the decision of another State's court, and thus violated the United States Constitution. *Held*, that penal laws are those which impose punishment for an

offence against the State; and the term does not include statutes which give a private right of action against a wrong-doer. Therefore the statute in question here is not a penal statute in a sense to make it unenforceable by the courts of another State. Therefore the decision of the Maryland court violated the United States Constitution, art. 4, § 1, because it failed to give faith and credit to the judgment of another State. *Huntington v. Attrill*, 13 Sup. Ct. 224.

CONSTITUTIONAL LAW — TAX ON INTERSTATE COMMERCE — POLICE POWER. — Under Stat. Ill. the city of Chicago laid a license tax on tugs which towed vessels in the Chicago River. Plaintiff owned tugs licensed by the United States to engage in the coasting trade, and resisted payment of the city tax. The Supreme Court of Illinois held the tax valid, on the ground that, as the city had spent large sums in improving the river, this tax was really a compensation for benefits conferred on plaintiff by the improvements. On writ of error it was *held*, that this license tax is unconstitutional, as a tax on interstate commerce. It is not valid as a charge for benefit conferred by the city in deepening the river, — first, because the ordinance does not profess to be laid for this purpose; second because it does not in fact appear that the tugs get any special benefit from the improvements. *Harmon v. City of Chicago*, 13 Sup. Ct. Rep. 306.

The court here relies on the authority of *Gibbons v. Ogden*, 9 Wheat. 210; *Foster v. Davenport*, 22 How. 244; and *Moran v. New Orleans*, 112 U. S. 69. The only noteworthy matter in the case is that the State court should have upheld the tax at all.

CONTRACTS — PROMISE IMPLIED BY LAW. — Defendant made an agreement with plaintiff for "lease" of "all the coal" in plaintiffs' land. Defendant was to pay a certain royalty per ton on all coal which it took, and was to mine the coal itself. It was to take only coal of a certain quality and which could be mined at a certain profit, but was to mine not less than a certain number of tons per annum. There was no limit to the time which defendant should have to work the mine. The defendant worked the mine so negligently that long before all the coal which would meet the requirements of the contract was dug, it became impossible to dig any more. Plaintiff sued on the contract, and the defendant contended that she had no cause of action while defendant continued to pay what she would have received each year if the minimum fixed by the agreement had been mined. *Held*, that this was an executory contract, and not a deed of the coal as it lay in the land. As both parties had contemplated that the plaintiff would receive each year much more than the minimum, and as the plaintiff would hardly have made the contract without such a prospect, the court would imply a promise on the part of the defendant not to incapacitate itself negligently from taking out more than the minimum amount of coal each year, and thus destroy the plaintiff's chance of receiving more than the minimum payment. *Genet v. D. & H. Canal Co.*, 32 N. E. Rep. 1078 (N. Y.).

If the court had held that the agreement was simply a sale of all plaintiff's coal which would be mined at a certain profit, it might well have implied a promise on the part of defendant not negligently to incapacitate itself from getting out the coal, and thus to lessen the amount which plaintiff should receive under the contract. The case cited on the opinion (*McIntyre v. Belcher*, 14 C. B. N. s. 654) would have supported that position. The case, however, does not support the implication made by the court; and it is submitted that the court went to the extreme limit in implying a promise that defendant should keep the mine in such a state that the plaintiff should receive a greater sum per annum than was called for by any part of the contract.

CONTRACTS — RESTRAINT OF TRADE. — The Associated Press of New York, incorporated for the procuring and supplying of its members with telegraphic news and the promotion of the general interests of the profession, passed a by-law forbidding any member to "receive and publish the regular news depatches of any other news association covering a like territory and organized for a like purpose with this association." *Held*, that this by-law was not void as unreasonable or as in restraint of trade. *Mathews v. Associated Press*, 32 N. E. Rep. 981 (N. Y.).

The court comments with approval on the growing tendency towards greater leniency in handling agreements in restraint of trade. It treats this by-law as intended to secure the highest skill of each member in gathering news, by confining publication to news so collected; and thus the restriction is in effect the same as the common agreement in partnerships requiring each partner not to engage in any other business.

CORPORATIONS, MUNICIPAL — COUNTY BONDS. — Const. Calo. art. 11, § 6, forbids counties to issue bonds beyond a certain amount. Statute 1887 provides that the commissioners of each county shall make a semi-annual statement of the debts of the county, which shall be entered on the record, and be open to public inspection. Defendant county, being already indebted beyond the limit, issued bonds which contained a recital

that the bonds were duly issued under the statute. *Held*, that these recitals did not estop the county from proving by the county records that the bonds were unconstitutionally issued, and therefore void. *Sutliff v. Board of Comm'rs for Lake County*, 13 Sup. Ct. Rep. 318.

The court follows *Dixon Co. v. Field*, 111 U. S. 83, and *Lake Co. v. Graham*, 130 U. S. 674, and distinguishes *Chaffee Co. v. Potter*, 142 U. S. 355. The test is whether the facts on which the validity of the bonds depends are matters of public record. If they are, it is the duty of purchasers to inspect the records. But if a purchaser by an inspection of the records could not see whether the issue was valid, the county would be estopped by such recitals in the bonds.

CORPORATIONS — RAILROADS — DIVERTED EARNINGS. — Money to the amount of \$2,300, derived from earnings of a railroad, was applied to permanent improvement. Subsequently a receiver under authority of court issued certificates for \$30,000 to satisfy claims incurred for operating expenses. *Held*, that the issue of such certificates was a restoration by the bondholders of the amount diverted for their benefit, and that one who had furnished supplies, although he had not received certificates, could not establish a lien ahead of the bondholders. *Finance Co. of Pennsylvania et al. v. C. C. & C. R. Co. et al. (Pocahontas Coal Co. et al., Intervener)*, 52 Fed. Rep. 524 (C. Ct.; S. Carolina).

CORPORATIONS — RAILROADS — DIVERTED EARNINGS. — A lawyer employed in a State where a railroad is only under construction, cannot establish a lien on the ground that earnings have been diverted; for this equity only attaches in favor of those who have contributed to the operation of the railroad as a going concern. *Finance Co. et al. v. C. C. & C. R. Co. et al. (Moon, Intervener)*, 52 Fed. Rep. 526 (C. Ct.; S. Carolina).

CORPORATIONS — RAILROADS — DIVERTED EARNINGS. — A lawyer employed to maintain the validity of bonds issued to aid a railroad is not entitled to a lien on the ground that earnings have been diverted, especially when his services were rendered two years before the appointment of a receiver. *Finance Co. et al. v. C. C. & C. R. Co. et al. (Shand et al., Interveners)*, 52 Fed. Rep. 678 (C. Ct.; S. Carolina).

The three cases noted are explanatory of the rule in *Fosdick v. Schall*, 99 U. S. 235, the underlying principle of which is this: "The earnings of the railroad must first be applied to meet the outlays necessary to keep it a going concern. Only after this application can the bondholders lay any claim to them. If earnings have been diverted from this primary purpose, and used for the advantage of the bondholders, either in payment of interest or in permanent improvements which tend to enhance the value of the property, the sums thus diverted must be restored, and the restoration must be from the income. If this fail, then the diversion must be met out of the proceeds of sale." *Simonton, J.*, in 52 Fed. Rep. 525. While the courts favor a strict construction of the doctrine, a later case, *Farmers' Loan & Trust Co. v. R. R. Co.*, 53 Fed. Rep. 182 (C. Ct., Kans.), contains an elaborate *dictum* by Caldwell, J., who makes the rule very broad and applicable to any claims for services rendered in keeping a railroad a going concern or in constructing it, whether or not earnings were diverted. An exhaustive note is appended to the case by Mr. M. M. Cohn, of Little Rock, who argues strongly in favor of the broad doctrine.

CORPORATIONS — RESCISSION OF VOTE OF DIVIDEND. — *Held*, that where the fact that a dividend has been voted by directors is not made public or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded. *Ford v. Easthampton Rubberthread Co.*, 30 N. E. Rep. 1036 (Mass.).

The doctrine as usually stated is that a dividend, when declared, is irrevocable (1 *Morawetz Corp.* § 445). The meaning of *declared*, however, has not been laid down, though there are cases holding that there was a declaration where a fund was set apart (*King v. R. R.*, 29 N. J. Law, 82), where stockholders were credited with the dividends on the books (*Van Dyke v. McQuaide*, 86 N. Y. 38), and even where the directors voted to declare a dividend and credit it on the books (*Beers v. Bridgeport Spring Co.*, 42 Conn. 17 *sem.*). The principal case lays down the first limitation of the essentials of a *declaration* by holding that a mere vote of the directors without publication is not sufficient.

EQUITY — ENJOINING ACTIONS AT LAW — MULTIPLICITY OF ACTIONS. — A number of persons brought actions for injuries to their respective property caused by sparks from defendant's engine. As the losses arose from the same occurrence and involved the same questions of law of fact, defendant filed a bill that plaintiff be enjoined from prosecuting separate actions, and be required to come into equity. *Held*, mere community of interest in the questions of law and fact involved will not warrant an injunction and joinder of all the plaintiffs in one suit to prevent multiplicity of actions. There

must be some ground for equitable interference in the subject matter of the controversy, or some common right or title in issue. *Tribbette v. Ill. Cent. R. R. Co.*, 12 So. Rep. 32 (Miss.).

This case expressly disagrees with the opinion of Pomeroy, who in an elaborate argument insists that a joinder should be allowed where there is mere community of interest in the questions of law and fact involved (Pomeroy, Eq. Juris. 2d ed., § 267-269). The principal case, however, seems to follow the sounder principles of equity jurisdiction. *Marcelis v. Canal Co.*, 1 N. J. Eq. 31; *Cutting v. Gilbert*, 5 Blatch. 261-263; *Youngblood v. Sexton*, 32 Mich. 406 (opinion by Judge Cooley). Is it not a safe practical rule to permit such a joinder as this only where the claims depend on the same law and facts, and the relief demanded is identical? Here the damages to be proved by the parties might be very different.

EQUITY — QUIETING TITLE — CONDITIONAL DECREE.— D, a trustee of the plaintiff town, forged a resolution authorizing him to sell land, and under color of it sold some of the town lands to defendant. Subsequent trustees of the town, in ignorance of the forgery, sued D to judgment for failing to account for the proceeds of the sale. Before receiving satisfaction, the trustees discovered D's fraud, and abandoning further proceedings against D, brought this suit to set aside and cancel this deed as a cloud on the town's title. *Held*, that plaintiff could have relief only on condition of assigning to defendant its judgment against D. *Trustees of Easthampton v. Bowman*, 32 N. E. Rep. 987 (N. Y.).

The decision is an interesting application of the maxim "That he who seeks equity must do equity."

EVIDENCE — EVIDENCE OF EXPERIMENTS.— In a case where it was material to show that a car moving on a down grade had jumped forward at the release of the brakes, *held*, that it was error to exclude evidence of the result of an experiment made at the same place under similar conditions. McBride, J., *dissented*. *C. St. L. & P. R. R. v. Champion*, 32 N. E. Rep. 874 (Ind.).

The report does not state whether the trial court excluded the evidence as a matter of right or as an exercise of discretion. It is submitted that unless the former was the case, the decision cannot be supported; for this experiment was logically a probative matter, but objectionable as tending to multiply issues, and as likely to have an undue weight with the jury. The force of these objections varies so much with the particular circumstance of each case that the admissibility of the evidence should be left to the discretion of the trial court.

EVIDENCE — HEARSAY — PROOF OF AGE.— To prove infancy, plaintiff offered the testimony of his brother and brother-in-law that by reputation in the family he was under twenty-one. *Held*, the evidence was hearsay and inadmissible. *Rogers v. De Bardelaben &c. Co.*, 12 So. Rep. 81 (Ala.).

It is the rule that a witness may swear to his own age, probably because his information, derived from family talk, birthdays, and other sources, amounts practically to knowledge of the fact. 9 W. Va. 559; 34 Mich. 296; 126 Mass. 234; 142 Mass. 466; 40 Fed. Rep. 235; 108 N. C. 747. The testimony of a brother is based upon information of the same sort, though not quite as likely to be accurate. The exclusion of it is perhaps questionable, unless the testimony of the party himself is a single exception to the rule against hearsay, the limits of which cannot be extended.

EVIDENCE — RES GESTÆ — DECLARATION OF INTENTION.— Defendant changed his abode; to prove that he intended a permanent change of residence, he was allowed to show certain acts, with accompanying declarations. These were allowed as part of the *res gestæ*. *Viles v. Waltham*, 32 N. E. Rep. 901 (Mass.).

Knowlton, J., cites *Trefethen's Case*, 31 N. E. 961; 6 Harv. Law Rev. 266, where a declaration of deceased that she intended to commit suicide was admitted. But he is of opinion that declarations of intention when made by a party to the suit should be restricted, because they are often biased, especially if made after the beginning of the action. They have also been often excluded, unless corroborated by being accompanied by acts which are admissible in evidence.

INSOLVENCY — DISTRIBUTION OF ASSETS.— Where there were both secured and unsecured creditors of an insolvent, *held*, that the secured creditors should first exhaust their security, apply the proceeds to the diminution of their claims, and then share on the balance of their claims *pro rata* with the unsecured creditors. *Dexter v. Schwabacher*, 31 Pac. Rep. 755 (Wash.).

The authorities are conflicting. In accord with the principal case are: 11 Paige, 581; 16 Mass. 308; 13 Ia. 515. But see *contra*: 121 N. Y. 328; 25 R. I. 480; 82 Mich. 607.

PROCEDURE — REMOVAL OF CAUSES — DIVERSE CITIZENSHIP — ACTION BY STATE. — A suit by a State in one of its own courts against a citizen of another State is not removable to the United States Circuit Court on the ground of diverse citizenship of the parties. *State of Indiana v. Tolleston Club of Chicago*, 53 Fed. Rep. 18 (C. Ct., Ind.).

PROCEDURE — REMOVAL OF CAUSES — WAIVER OF OBJECTION TO IMPROPER SERVICE. — According to the settled rule of the Sixth Circuit, a defendant who removes a cause to a Federal court will not there be heard to say that he was not properly brought before the State court, when he has failed to raise this point before applying for removal. *Bentlif v. Finance Corp.*, 44 Fed. Rep. 667, disapproved. *New York Construction Co. v. Simon*, 53 Fed. Rep. 1 (C. Ct., Ohio).

REAL PROPERTY — ADMINISTRATION OF ESTATE OF PERSON PRESUMED DEAD. — Where a person disappeared from home, and was not heard of for more than seven years, and, administration of his estate being granted, his land was sold, *held*, he could not recover it in ejectment from an innocent purchaser. *Scott v. McNeal*, 31 Pac. Rep. 873 (Wash.).

The court follows *Roderigas v. Savings Institution*, 63 N. Y. 460, which though heretofore standing alone, is approved by Woerner, Adm'n, § 211. For authorities holding the contrary view, see Woerner, Adm'n, §§ 208, 209.

REAL PROPERTY — EMINENT DOMAIN — HIGHWAY CROSSING RAILROAD. — Where a highway was located across the tracks of a railroad, *held*, that the railroad company was entitled to compensation for all expense incurred in the establishment of the crossing. *Chicago, &c. R. R. Co. v. Board of Com'rs of Chatauqua County*, 31 Pac. Rep. 736 (Kansas).

Johnston, J., *dissents*, on the ground that the franchise and right of way, having been obtained from the public, are held subject to the right of the public to extend highways across such right of way whenever it becomes necessary. In accord with the opinion of the court are: 45 Kan. 716; 24 Ind. 325; 14 Gray, 155; 49 Mich. 47; 14 S. W. Rep. 808 (Mo.). But see *contra*: 29 N. E. Rep. 1109 (Ill.); 79 Me. 386; 24 N. Y. 345; 38 Ohio St. 150; 27 Vt. 140.

STATUTE, CONSTRUCTION OF — NATURE OF CHINESE EXCLUSION ACT. — The Chinese Exclusion Act, which provides that any Chinese person arrested under its provisions shall be deemed to be unlawfully in the United States, unless he can affirmatively prove his right to be here, and also "That any such Chinese person . . . convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States," is political, not criminal, and an indictment under it must be quashed. *United States v. Hing Quong Chow*, 53 Fed. Rep. 233 (C. Ct., La.).

No authorities are cited by Billings, J., to support this decision, and a special search has failed to produce any directly upon it. The court held that the proceeding of keeping out obnoxious foreigners must be summary to be effective, and that the criminal law was therefore inapplicable; and that while Congress might have reversed the common rule as to burden of proof as to a political, it was not to be supposed that it would as to a criminal offence.

TORT — CORPORATION — DAMAGES. — Defendant's conductor imprisoned and insulted plaintiff, a passenger, in a wanton manner. There was no evidence that defendant had any means of knowing that its conductor was not a suitable person for his place. *Held*, that as defendant was not at fault in having the conductor in its service, it was not liable for punitive damages. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. Rep. 261.

This decision is based on the doctrine of punitive damages as applied to a natural principal; that some fault in the principal must be shown to hold him liable in punitive damages for the torts of his agent for which the latter is liable in punitive damages. There is no good reason for enforcing a harsher rule against a corporation principal. This view is put forward in Sedgwick on Damages, 8th ed., § 378, and 2 Morawetz Corporations, 2d ed., §§ 728, 729, where the cases on the subject are collected.

TORT — DAMAGES — REMOTENESS OF MENTAL SUFFERING. — *Held*, in an action for non-delivery of a telegram, that it was error to allow the jury to include as subject for compensation the plaintiff's grief at the suffering caused his wife by the absence of their daughter from a funeral to which the telegram had summoned her. That part of the father's suffering which was caused directly by his daughter's absence is proper subject for compensation. *W. U. Telegraph Co. v. Strateweier*, 32 N. E. Rep. 871 (Ind.).

This decision follows the leading case of *Reese v. Telegraph Co.*, 123 Ind. 294, in allowing damages for mental suffering, but limiting them by the ordinary tests of remoteness, peculiarly difficult in such cases, but necessary if the damages are to be allowed at all.

TORT — EMPLOYERS' LIABILITY ACT — EFFECT UPON CONTRACTS FOR SERVICE. — Plaintiff contracted in Alabama to serve defendant as a brakeman, and was injured in Mississippi by the negligence of a fellow-servant. At common law, which prevails in Mississippi, defendant would not be liable, but by the Employers' Liability Act of Alabama he would be. An action was brought in Alabama, on the ground that the act was part of the contract of service, and the liabilities which it prescribed attended the contract wherever performance was required. *Held*, the liabilities prescribed are not contractual liabilities, so there can be no recovery. *Alabama G. S. R. Co. v. Carrol*, 11 So. Rep. 803 (Ala.).

TORT — EMPLOYERS' LIABILITY ACT — VOLENTI NON FIT INJURIA. — Defendant had no railing along a run in his coal-shed where plaintiff wheeled coal, and plaintiff was thereby injured. The defect was "in the ways, works, and machinery" within the terms of the Employers' Liability Act, but plaintiff entered the service knowing the danger and had remained in it for fifteen years. *Held*, a workman impliedly contracts to take obvious risks of the business when he enters service. *O'Maley v. Gaslight Co.*, 32 N. E. Rep. 1119 (Mass.).

Alabama G. S. R. Co. v. Carroll, *supra*, seems clearly right in not reading the Employers' Liability Act into the contract of service. To read it in, however, would seem little less arbitrary than to imply a contract not to take advantage of it, as the court substantially do in this case. The court say the precise question here involved has never been settled in England, because the danger here existed before the contract was made. But it is submitted that contract has nothing to do with the case, and talk about implied contracts which the parties never contemplated is only confusing. The only question is whether the plaintiff knew of the risk and consented to take it. If so, *volenti non fit injuria* applies, and the case falls within the principles of *Smith v. Baker*, [1891] App. Cas. 325. The result reached in the case is not criticised.

TORT — NEGLIGENCE — BLOWING LOCOMOTIVE WHISTLE. — Plaintiff below was injured as a result of the fright of his horse at the sound of a locomotive whistle. The trial judge instructed the jury that if, in that place, there was no "imminent or immediate danger to life or property," the blowing of the whistle was negligent. *Held*, such instruction was correct as a common law rule. *Northern Pacific R. R. Co. v. Sullivan*, 53 Fed. Rep. 219 (C. Ct. App., Minn.).

The court cites *Shearman & Redfield* on Negligence, § 56, as to when the court can rule as to what is negligence. In this case an affirmative act of the defendant was held as matter of law to be negligent, while generally such rulings have been as to negative acts or omissions.

TRUSTS — INSANITY OF PARTY CREATING. — Plaintiff's husband borrowed money of A. on his promissory note. To secure this note plaintiff and her husband executed a deed of trust to the defendant, conveying with other land some land of plaintiff's. Plaintiff was insane at the time of the execution of the deed, though A. had no knowledge of it, and acted in good faith. *Held*, that upon these facts plaintiff was not entitled to have the deed of trust cancelled, and defendant enjoined from selling the land under a power contained in the deed. *Blount v. Spratt*, 20 S. W. Rep. 967 (Mo.).

It is frequently held that contracts and conveyances of insane persons are binding in favor of parties without notice of insanity if the insane person has received fair value for his promise or conveyance; but this case goes a step beyond, and holds the insane person liable, though she receives no benefit whatever. None of the authorities which the court cites support this extreme position. It was held in *Imperial Loan Co. v. Stone*, [1892], Q. B. D. 599, that a surety cannot escape liability on the ground of insanity; but we have found no other case which goes so far, while the following cases lay down rules which lead to the opposite result from that of the principal case: *Moore v. Hershey*, 90 Pa. 197; *Wirebach's Ex'r v. Nat. Bank of Easton*, 97 Pa. 543.

TRUSTS — WHEN COURT WILL NOT IMPLY. — Defendant undertook to make the purchase of certain land for the benefit of himself and plaintiffs, in accordance with an oral agreement made with plaintiffs. In violation of his agreement, defendant made a contract for a conveyance to himself, and refused to give to plaintiffs any interest in the land. Plaintiffs brought a bill praying that defendant should give them an interest, but were defeated. *Emerson et al. v. Galloupe et al.*, 32 N. E. Rep. 118 (Mass.).

The court speak as though there were no ground for implying a trust, except that an express trust had failed through the Statute of Fraud; but this seems a clear case of a fiduciary competing with one who has reposed confidence in him, and therefore just the case where a constructive trust should be raised. The Massachusetts court has for precedents on similar facts, *Collins v. Sullivan*, 135 Mass. 461, and *Burden v. Sheridan*, 36 Ia. 125; *Rose v. Hayden*, 35 Kan. 106, is *contra*.

REVIEWS.

DEUTSCHE RECHTSGESCHICHTE. Von Heinrich Brunner. Erster Band XII., 412 S. 1887. Preis, 9 M. 60 Pf. Zweiter Band XI., 762 S. 1892. Preis, 17 M. Leipzig: Duncker und Humblot.

This is the latest and the best of the histories of German law. Professor Brunner's brilliant solution of that long-standing puzzle, the origin of the jury, has given him a distinction for all time with students of English law. As might be expected, the book before us discloses a rare familiarity with the sources of our law, and at many points shows the connection between English and Teutonic legal institutions. To mention a single instance, the learned reader will find, in section 118 of the second volume, a clear exposition of the pursuit of stolen chattels, the origin of that tissue of fictions, the modern count in trover. The work richly merits an English translation.

J. B. A.

THE RAILROADS AND THE COMMERCE CLAUSE. By Francis Cope Hartshorne. pp. xxiii, 165. Philadelphia: University of Pennsylvania Press. 1893.

This is an excellent little book, and very timely. It discusses the main questions arising out of the Federal power to regulate interstate and foreign commerce, with clearness and discrimination, and with competent business knowledge and legal learning. The author has a just appreciation of the enormous reach of power that belongs to the general government under the head of regulating these branches of commerce, and he follows it out to the simple conclusion which he quotes from Mr. Justice Bradley, in *Stockton v. B. & N. Y. R. R. Co.*, 32 Fed. Rep. 9 (1887), that, "In matters of foreign and interstate commerce there are no States." The body of the work is in three parts. Part I. discusses the power of Congress in regulating railroads; Part II., that of the States; Part III., the power of the States over the taxation of railroads. Throughout, the discussion is equally intelligent and instructive. One who would reach a just understanding of the present state of the doctrine of the Federal courts upon the extremely difficult subject of the regulation of foreign and interstate commerce will find nothing better than this little treatise by Mr. Hartshorne, and its worthy fellow (published, like this, under the auspices of the University of Pennsylvania), Mr. William Draper Lewis's "Federal Power over Commerce."

J. B. T.

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